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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 81

THE UNITED STATES OF AMERICA, APPELLANT

vs.

THE WAYNE PUMP COMPANY, GILBERT AND BARKER
MANUFACTURING COMPANY, TOKHEIM OIL TANK
AND PUMP COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS

FILED APRIL 24, 1942

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1 [Caption omitted.]

2 In United States District Court, Northern District
of Illinois

THE UNITED STATES

vs.

THE WAYNE PUMP COMPANY, GILBERT AND BARKER MANUFACTURING COMPANY, TOKHEIM OIL TANK AND PUMP COMPANY, VEEDER-ROOT INCORPORATED, GASOLINE PUMP MANUFACTURERS ASSOCIATION, B. F. GEYER, S. C. HOPE, G. DENNY MOORE, G. H. ANTHONY, J. H. CHAPLIN

F. U. S.: J. Albert Woll.

1941

Jan. 31—Filed Indictment summons to issue for corporations and bench warrants for individual debts and bonds for individual debts, fixed at \$1,000.00. Woodward, J.

Jan. 31—Issued (5) summons and (5) bench warrants.

Feb. 4—Issued certified copy of Indictment to Tokheim Oil Tank and Pump Co.

Feb. 6—Filed Bond (Tokheim Oil Tank and Pump Co.) Surety Co.

Feb. 6—Filed Bond (Wayne Pump Company) Surety Co.

Feb. 6—Filed Bond (B. F. Geyer) Surety Co.

Feb. 8—Issued certified copy of Indictment to Atty. General Swanson.

Feb. 10—Order Clerk to return bond in amount of \$2,000 erroneously filed on behalf of Wayne Pump Co. as an appearance bond in this cause and cause 32598. Barnes, J.

Feb. 10—Filed receipt of Charles L. Byron.

Feb. 11—Filed Bond (Denny Moore) Surety Co.

Feb. 12—Filed Bond (Graham Anthony) Surety Co.

Feb. 12—Filed Bond (J. H. Chaplin) Surety Co.

Feb. 14—Filed Appearance—Gilbert & Barker Mfg. Co. and S. C. Hope, Winston Strawn and Shaw, James H. Winston and John C. Slade of counsel.

Feb. 12—Filed Appearance—The Wayne Pump Co., a Corp., and B. F. Geyer—Edward R. Johnston and Chas. L. Byron and Howard Somervell, Attys:

- Feb. 12—Filed Appearance—Veeder-Root, Inc., G. H. Anthony and J. H. Chaplin—James M. Carlisle and Arthur A. Lytton, Attys.
- Feb. 12—Filed Appearance—The Wayne Pump Co., a Corp., and B. F. Geyer—Edw. R. Johnston, Chas L. Byron and Howard Somervell, Attys.
- Feb. 20—Filed Bond (S. C. Hope) Surety Co.
- Feb. 24—Filed Appearance—Tokheim Oil Tank and Pump Co.—Ballard Moore, Harold W. Norman, and Louis F. Niezer, Attys.
- Feb. 24—Order Clerk of U. S. Court to release to Tokheim Oil Tank and Pump Co. a bond in sum of \$1,000 inadvertently filed by said company. Sullivan, J.
- Feb. 25—Filed Appearance—Gasoline Pump Manufacturers Association and G. Denny Moore, Harold W. Norman, Atty.
- Feb. 27—On mo. of defts. Attys., cause contd. for plea to March 31, 1941. Sullivan, J.
- Mar. 17—Filed (5) Bench Warrants ret'd. unex. bonds given.
- Mar. 17—Filed Summons ret'd. unex. (5).
- Mar. 29—Filed Withdrawal and Substitution of Attorneys—Barry, Gilbert, & Cassels, Potter & Bentley, Attys.
- Mar. 29—Filed Demurrer of Tokheim Oil Tank and Pump Company, Ballard Moore, Louis F. Niezer, and Harold W. Norman, Attys.
- Mar. 31—Filed Appearance of Harold F. McGuire as add'l counsel of Veeder-Root, Incl., G. H. Anthony, and J. H. Chaplin, defts.
- Mar. 31—Filed Joint and Several Demurrer of Defts. The Wayne Pump Company and B. F. Geyer by Edward R. Johnston, Charles L. Byron, and Howard Somervell, Attys.
- Mar. 31—Filed Joint and several demurrer and motion to quash of Veeder-Root, Incorporated, G. H. Anthony, J. H. Chaplin by Harold F. McGuire, James M. Carlisle, and Arthur S. Lytton, their Attys.
- 4 Mar. 31—Filed Joint and Several Demurrer of Defts. Gilbert & Barker Manufacturing Company, a Corp., and S. C. Hope by James H. Winston, John C. Slade, and George W. Ott, their Attys.
- Mar. 31—By agreement contd. for pleas as to defts. Gasoline Pump Mfg. Ass'n. and G. Denny Moore to April 18, 1941, Lv. given defts. to file Brief in 30 days and Gov't. to file reply brief 30 days thereafter. Sullivan, J.

- Apr. 4—Filed Joint And Several Demurrer Of The Defendants Gasoline Pump Mfg. Association (an unincorporated association) and G. Denny Moore—Barry Gilbert, Atty. for defts.
- Apr. 7—Rule on defts. Gasoline Pump Mfg. Assn. and G. Denny Moore to file briefs in support of demurrer in 30 days and Gov't. to file reply brief 30 days thereafter. Sullivan, J.
- Apr. 30—Filed Brief in Support of Demurrers to both Indictments filed by the Wayne Pump Co., B. F. Geyer, Tokheim Oil Tank and Pump Company, Veeder-Root, Inc., G. H. Anthony, J. H. Chaplin, and Brief of Gasoline Pump Manufacturers Association and G. Denny Moore in Support of Demurrer to First Indictment—by Attys. for the Defts.
- Apr. 30—Filed Notice of Filing and Proof of Service, Johnston, Byron, and Sommervell, Attys. for Wayne Pump Co. and B. F. Geyer—Harold W. Norman, L. F. Niezer, and B. Moore, Attys. for Tokheim Oil Tank and Pump Co.—H. F. McGuire, J. M. Carlisle, A. S. Lytton, Attys. for Veeder-Root, Inc., G. H. Anthony, J. H. Chaplin, B. Gilbert, Attys. for Gasoline Pump Manufacturers Association and G. Denny Moore.
- May 29—Filed Stipulation.
- May 29—Order extending defendants' time for filing reply briefs to and including June 14, 1941 as per stipulation. Sullivan, J.
- May 29—Filed Notice of Filing of Memorandum in Opposition to Demurrers and Their Supporting Briefs, Daniel D. Britt, Spl. Asst. to Atty. General.
- June 14—Filed Notice of Filing and Proof Of Service of Reply Brief—Attys. for defts.
- June 14—Filed Reply Brief in Support of Demurrers to Both Indictments on behalf of The Wayne Pump Company, B. F. Geyer, Tokheim Oil Tank and Pump Co., Veeder-Root Incorporated, G. H. Anthony, J. H. Chaplin, and Reply Brief of Gasoline Pump Mfgs. Ass'n. and G. Denny Moore in Support of Demurrer to First Indictment—Attys. for defts.
- Dec. 15—Argmts. hrd. in part and contd. for further hrg. to Dec. 16, 1941. Sullivan, J.
- Dec. 16—Argmts. hrd. and contd. and cause taken under advisement. Sullivan, J.
- 1942
- Feb. 24—Defts. demurrer to indictment sustained. Sullivan, J.

4 UNITED STATES VS. THE WAYNE PUMP CO. ET AL.

- Feb. 24—Filed Opinion of Judge Sullivan.
Mar. 26—Filed Petition for Appeal—Daniel D. Britt, Special Assistant to the Attorney General.
Mar. 26—Order allowing appeal to U. S. Supreme Court (draft). Sullivan, J.
Mar. 26—Filed Statement as to Jurisdiction, Assignments of Error, Proof of Service and Citation and Praecipe—Daniel B. Britt Special Assistant to the Attorney General.
Mar. 26—Filed Notice to Defendants of Provisions of Rule 12—Daniel D. Britt, Sp'l. Asst. to Atty. General.
Apr. 2—Issued partial copy of docket entries to Thurman Arnold.
Apr. 10—Filed Notice—Attys. for Appellees.
Apr. 10—Filed Statement of Appellees as to the Jurisdiction of the Supreme Court to Review Judgments of District Court entered Feb. 24, 1942—by Harold W. Norman, Louis F. Niezer and Ballard Moore, Attys. for Tokheim Oil Tank and Pump Co., Harold F. McQuire, James M. Carlisle and Arthur A. Lytton, Attys. for Veeder-Root, Incorporated, G. H. Anthony and J. H. Chaplin, and Barney Gilbert, Attorney for Gasoline Pump Manufacturers Association and G. Denny Moore.

6 In the District Court of the United States of America
for the Northern District of Illinois, Eastern Division

DECEMBER 1940 TERM

No. 32597

UNITED STATES OF AMERICA

v.

THE WAYNE PUMP COMPANY, ET. AL.

Indictment

Filed Jan. 31, 1941

UNITED STATES OF AMERICA,

Northern District of Illinois, Eastern Division, ss:

The Grand Jurors of the United States of America, being duly impaneled, sworn, and charged in the District Court of the United States of America, for the Eastern Division of the Northern District of Illinois, at the December 1940 Term of said Court, and inquiring within and for the said Division and District at the said

Term of said Court, upon their oaths find and present as follows, to wit:

I. PERIOD OF TIME COVERED BY THE INDICTMENT

1. Each of the allegations hereinafter contained in this indictment shall be deemed to refer to a period of time beginning in the year 1932, the exact date being to the grand jurors unknown, and continuing thereafter up to and including the date of the presentation of this indictment unless otherwise expressly stated.

2. Each allegation hereinafter made in this indictment that an act has been done by any of the defendants herein, or any other person, shall be deemed to be an allegation that such act was performed within three years next preceding the date of this indictment unless otherwise expressly stated.

II. DEFINITIONS

3. The term "gasoline pump" as used in this indictment shall be deemed to refer to any pump designed for dispensing gasoline.

4. The term "computing mechanism" as used in this indictment shall be deemed to refer to any mechanical device, which may be used in connection with a gasoline pump, that simultaneously calculates and registers quantities and prices of gasoline dispensed by such pump. The term "computing mechanism" shall also be deemed to include any mechanical device which may be used for varying the operation of a price register in a computing mechanism to enable such register to indicate calculated prices corresponding with selective changes made in the unit price of the gasoline being dispensed.

5. The term "computer pump" as used in this indictment shall be deemed to refer to a gasoline pump embodying a computing mechanism.

6. The term "noncomputer pump" as used in this indictment shall be deemed to refer to any gasoline pump other than a computer pump.

7. The word "patent" as used in this indictment shall be deemed to refer to applications for letters patent, applications for reissues of letters patent, as well as to patents.

III. THE DEFENDANTS

8. The following corporations, unincorporated associations, and persons are hereby indicted and made defendants herein:

a. The Wayne Pump Company, a Maryland corporation, having its principal place of business in Fort Wayne, Indiana. Said defendant is sometimes hereinafter referred to as "Wayne."

b. Gilbert and Barker Manufacturing Company, a Massachusetts corporation, having its principal place of business in West Springfield, Massachusetts. Said defendant is sometimes hereinafter referred to as "G & B."

c. Tokheim Oil Tank and Pump Company, an Indian corporation, having its principal place of business in Fort Wayne, Indiana. Said defendant is sometimes hereinafter referred to as "Tokheim."

d. Veeder-Root, Incorporated, a Connecticut corporation, having its principal place of business in Hartford, Connecticut. Said defendant is sometimes hereinafter referred to as "Veeder."

e. Gasoline Pump Manufacturers Association, sometimes hereinafter referred to as "Association," an unincorporated association having its principal office in New York, New York. Its membership consists for the most part of gasoline pump manufacturers including the defendants Wayne, G & B, and Tokheim.

f. B. F. Geyer, a resident of Fort Wayne, Indiana, who was Vice President of defendant Wayne from 1932 to 1937 and has been President of defendant Wayne since 1937. The defendant Geyer was also, from 1932 to 1937, President of Wayne Company, whose relationship with defendant Wayne is set forth hereinafter.

g. S. C. Hope, a resident of Springfield, Massachusetts. Said defendant has been President of defendant G & B during the period of time covered by this indictment.

h. G. H. Anthony, a resident of Hartford, Connecticut. Said defendant has been President of the defendant Veeder during the period of time covered by this indictment.

i. J. H. Chaplin, a resident of Hartford, Connecticut. Said defendant has been Vice President of the defendant Veeder during the period of time covered by this indictment.

j. G. Denny Moore, a resident of White Plains, New York. Said defendant has been Secretary of the defendant Association since 1933.

9. Wherever, in this indictment, it is alleged that a corporate defendant or that the defendant Association did any act or thing, such allegation shall be deemed to mean that the individuals named herein as defendants and described as officers, agents, or employees of said corporate defendant or of the defendant Association, did authorize, order, perform, or ratify such act or thing.

IV. COCONSPIRATORS

10. The following individual is not indicted but is named as a coconspirator herein: C. M. Niezer, a resident of Fort Wayne, Indiana, who has been President of Tokheim during the period of time covered by this indictment. During the period of time

covered by this indictment the above named coconspirator has actively engaged in the management of the business of Tokheim and, on his own behalf and on behalf of Tokheim, has conferred with the defendants named herein and with other persons to the Grand Jurors unknown and has participated in, done, or ordered to be done, in whole or in part, the activities constituting the offense hereinafter charged in this indictment.

V. RELATIONSHIPS OF DEFENDANT WAYNE WITH WAYNE COMPANY

11. From 1932 until 1937, the defendant Wayne owned the stock of Wayne Company, an Indiana corporation having its principal office in Fort Wayne, Indiana. During such period of time Wayne Company was engaged in manufacturing and selling gasoline pumps and acquired ownership or secured control of certain patents pertaining to computing mechanisms and computer pumps and entered into certain license agreements with reference to such patents. The President of defendant Wayne, during said period, was Vice President of Wayne Company, and the Vice President of defendant Wayne was President of Wayne Company. The defendant Wayne controlled the policies of Wayne Company during the aforesaid period of time and authorized, directed, and ratified the acts and things done by Wayne Company and its officers, agents, and employees during said period.

10 12. In 1937 the defendant Wayne took over the assets, including patents and licenses issued under such patents, of its operating subsidiary, Wayne Company, and since such time has been engaged directly in manufacturing and selling gasoline pumps. Wayne Company has not since 1937 been engaged in the manufacture or sale of gasoline pumps.

VI. THE NATURE OF THE TRADE AND COMMERCE INVOLVED

13. The use of gasoline pumps is essential to the proper supply of gasoline to the millions of passenger cars and trucks operating on the highways of the United States. Changes in types of gasoline pumps have paralleled the major changes and improvements in the manufacture of automobiles. The earliest type of gasoline pump pumped gasoline out of one container into another container which acted as a measuring device. Later a gasoline pump was developed to measure a designated quantity of gasoline with a single stroke of the pumping handle. During the middle part of the twenties the so-called visible type of pump appeared on the market. On the top of the visible pump rested a large graduated glass bowl. The required amount of gasoline was pumped into this bowl, usually by hand, and was then dispensed to the customer by permitting gravity to carry the gasoline from

the bowl to the gasoline tank in the motor vehicle. During the latter part of the twenties a great advance in gasoline pump construction was made in the development of the so-called meter pump. This pump, operated either by hand or by electricity, contained in addition to the pump, a meter for measuring the quantity of gasoline. The quantity was then registered by means of pointers revolving around a clock type dial placed above the meter.

11 14. In 1933 the first computer pump was placed on the market and due to public demand, aided by an energetic marketing program such pumps have since that date largely supplanted the non-computer pump. The computer pump was greatly favored by the public because the customer was able to see at a glance both the price and the quantity of the gasoline he had purchased. The shift in public demand from non-computer pumps to computer pumps has been so marked that for several years it has been all but impossible for any gasoline pump manufacturer to continue to engage in such business unless he manufactured computer pumps.

15. The shift in sales from noncomputer to computer pumps is shown by the following table:

MANUFACTURERS' SALES OF GASOLINE PUMPS

| Year | Computer pumps | All gasoline pumps including computer pumps | Proportionate value of computer pumps |
|------|---------------------------------------|---|---------------------------------------|
| | | | Percent |
| 1931 | None | \$14,397,681 | 0 |
| 1933 | Small production chiefly experimental | 7,420,262 | 9 |
| 1935 | \$9,076,219 | 12,060,219 | 75 |
| 1937 | \$25,283,753 | 28,518,799 | 88 |
| 1939 | \$20,630,976 | 22,003,649 | 91 |

16. The magnitude of the industry is shown by the fact that there are approximately 1,300,000 gasoline pumps in use in the United States and approximately 100,000 gasoline pumps are sold in the United States each year by gasoline pump manufacturers.

17. Prior to 1932 and during the period of time covered by this indictment, numerous applications for letters patent have been filed in the United States Patent Office on computer pumps, computing mechanisms, and improvements on computer pumps and computing mechanisms, and the United States Patent Office has issued numerous patents on such subjects. On or 12 about November 22, 1932, the United States Patent Office issued a patent, known as the "Jauch Patent," on a computer pump. The Jauch Patent was issued by the Patent Office

to certain employees of the Wayne Company who immediately assigned the said Jauch Patent to the Wayne Company. Under said Jauch Patent and other patents issued as hereinafter described the defendant Wayne has licensed certain other gasoline pump manufacturers to make, use, and sell computer pumps, as hereinafter alleged.

18. An indispensable element of every computer pump is the computing mechanism. Without a source of supply of such mechanisms a manufacturer cannot make computer pumps.

19. The defendant Wayne, both before and after the issuance of the Jauch Patent, entered into certain arrangements and understandings with defendant Veeder, as hereinafter alleged, whereby the manufacturing and other facilities and patents of the defendant Veeder were to be utilized in the development of a commercially feasible computing mechanism. The defendant Veeder developed such a mechanism and during the period of time covered by this indictment, has manufactured such mechanisms and has sold such mechanisms in interstate trade and commerce, for use in computer pumps, only to defendants Wayne, G & B, and Tokheim, and such other manufacturers of gasoline pumps as are permitted by Wayne, G & B, and Tokheim to purchase computing mechanisms from Veeder.

20. The defendant Veeder manufactures computing mechanisms in the State of Connecticut and sells and ships such mechanisms to gasoline pump manufacturers in the States of Indiana, Massachusetts, Pennsylvania, Texas, and other states of the United States where computer pumps are manufactured. Such gasoline pump manufacturers, including defendants Wayne, G & B, and Tokheim, sell and ship computer pumps from their plants to customers located in other States of the United States including customers in the Eastern Division of the Northern District of the State of Illinois.

13 21. During the period of time covered by this indictment the Neptune Meter Company (sometimes hereinafter referred to as "Neptune") manufactured computing mechanisms in the State of New York and sold and shipped such mechanisms to numerous manufacturers of gasoline pumps, other than defendants Wayne, G & B, and Tokheim, located in States other than New York, who used such computing mechanisms in the manufacture of computer pumps which were sold and shipped by such manufacturers to customers located in States other than where the computer pumps were manufactured. Such pumps were sold in competition with those manufactured by the defendant Wayne and its licensees including G & B and Tokheim.

22. During the same period of time other gasoline pump manufacturers produced computing mechanisms which were used in

computer pumps of their own make which were sold and shipped to customers located in States other than where the pumps were manufactured, in competition with the computer pumps manufactured by the defendant Wayne and its licensees, including G & B and Tokheim, and in competition with the computer pumps manufactured by companies purchasing computing mechanisms from Neptune.

23. Since the year 1938, however, the defendant Veeder has been the sole manufacturer in the United States of computing mechanisms used in computer pumps and the only available source of computing mechanisms used by manufacturers in the making of computer pumps.

24. The defendants Wayne, G & B, and Tokheim during the period of time covered by this indictment have been the three leading manufacturers of gasoline pumps in the United States. In 1939 such defendants manufactured and sold computer pumps constituting 56% of the value of all computer pumps sold in the United States, while Wayne, G & B, and Tokheim, with the eight other manufacturers licensed by Wayne, with the consent of G & B and Tokheim, to buy computing mechanisms from defendant Veeder and make computer pumps, manufac-

14. tured and sold 100 per cent of the computer pumps made and sold in the United States. In the same year gasoline pumps of all types manufactured by Wayne and its licensees constituted approximately 99 per cent of the value of all gasoline pumps manufactured and sold in the United States. In 1931, prior to the introduction of computer pumps, there were approximately thirty manufacturers of gasoline pumps in the United States.

25. Most of the computer pumps manufactured by defendants Wayne, G & B, and Tokheim and other manufacturers are sold in interstate trade and commerce to major oil companies and to independent gasoline station operators for installation in gasoline filling stations throughout the United States.

VII. THE COMBINATION AND CONSPIRACY

26. The Grand Jurors aforesaid, upon their oaths aforesaid, do further present that all the defendants herein and other persons to the Grand Jurors unknown, well knowing all the facts alleged in this indictment, beginning in or about the year 1932, the exact date being to the Grand Jurors unknown, and continuously thereafter up to and including the date of the presentation of this indictment, knowingly have entered into and engaged in a combination and conspiracy to fix, maintain, and control arbitrary, artificial, and noncompetitive prices for the sale of computer

pumps in the aforesaid interstate trade and commerce, which combination and conspiracy, in fact, has been and is now in restraint of trade and commerce in computer pumps among the several states and in violation of Section 1 of the Act of Congress of July 2, 1890 entitled "An Act To protect trade and commerce against unlawful restraints and monopolies" (U. S. C. A., Title 15, Section 1), commonly known as the Sherman Act; which combination and conspiracy is now described in further detail, that is to say:

27. It is and has been a part of said combination and conspiracy that the defendants Wayne, G & B, and Tokheim
 15 use the Jauch patent owned by Wayne for the purpose of fixing prices among themselves on their sales of computer pumps; that the defendant Wayne license the defendants G & B and Tokheim under the Jauch patent to make, use, and sell computer pumps; that the defendants Veeder, G & B, and Tokheim acknowledge the validity of the Jauch patent; that the defendant Wayne acquire, by purchase or otherwise, ownership or control of all patents on computing mechanisms and computer pumps capable of competing with computing mechanisms manufactured by Veeder or with computer pumps manufactured by Wayne, G & B, and Tokheim; that the defendant Veeder convey to Wayne ownership or control of all patents covering computing mechanisms and vital parts thereof developed by Veeder or its employees; that the defendant Veeder acquire, by purchase or otherwise, ownership or control of patents on computing mechanisms capable of competing with computing mechanisms manufactured by Veeder or with computer pumps manufactured by Wayne, G & B, and Tokheim and convey ownership or control of such patents to Wayne; that the defendant Wayne determine the use of all patents on computing mechanisms and computer pumps and improvements thereon owned or controlled by either of the defendants G & B and Tokheim; that the defendant Wayne secure for itself and its gasoline pump manufacturer licensees special rights under patents on devices pertaining to the operation of computer pumps which are required by State Sealers or Fire Underwriters; that the defendant Wayne cause owners of all patents which the United States Patent Office declares to be in interference with the Jauch patent, to file in said Patent Office concessions of priority to the Jauch patent; that the defendants Wayne, G & B, and Tokheim purchase computing mechanisms only from the defendant Veeder; that Veeder sell computing mechanisms for use in the manufacture of computer pumps only to Wayne, G & B, and Tokheim and other purchasers approved by Wayne, G & B, and Tokheim; that the defendants Wayne,

G & B, and Tokheim devise a formula for determining minimum prices for the sale of computer pumps; that the defendant

16 Wayne, on the basis of aforesaid formula, determine prices for the sale of computer pumps; that the defendants

Wayne, G & B, and Tokheim also determine other terms and conditions for the sale of computer pumps, including discounts

and salesmen's commissions; that the defendant Wayne from time to time issue announcements and regulations stating and

interpreting the aforesaid prices, discounts, commissions, terms and conditions; that the defendants Wayne, G & B, and Tokheim,

in selling computer pumps, adhere to the prices, discounts, commissions, terms, and conditions contained in the aforesaid announcements and regulations; that the said defendants determine

jobbers' resale prices for computer pumps, refuse to sell computer pumps to any jobber failing or refusing to adhere to such resale

prices, and eliminate discounts to all jobbers in the event of a general failure by jobbers to adhere to the said resale prices;

that the said defendants, in determining salesmen's commissions as aforesaid, lower them from time to time and require discounts

to be deducted from said salesmen's commissions; that the said defendants refrain from using computing mechanisms to convert

noncomputer pumps into computer pumps; that the said defendants refuse to sell computing mechanisms for use in converting

noncomputer pumps into computer pumps; that the said defendants restrict and discourage the sale of noncomputer pumps and

vigorously promote the sale of computer pumps; that the defendant Wayne license no others than G & B and Tokheim under

the Jauch patent except with the consent of G & B and Tokheim and upon terms authorized by G & B and Tokheim; that the

defendant Wayne with the consent of the defendants G & B and Tokheim approach gasoline pump manufacturers purchasing computing

mechanisms from Neptune and all gasoline pump manufacturers using computing mechanisms of their own make in the

manufacture of computer pumps, induce each of such manufacturers to accept a license under the Jauch patent, and, with

the authorization of G & B and Tokheim, issue such license to each of such manufacturers on terms securing to the

17 defendants Wayne, G & B, and Tokheim control of all of the new licensee's patents on computing mechanisms and

computer pumps and of the licensee's prices for the sale of computer pumps; that the defendant Wayne with the consent of

G & B and Tokheim compel Neptune, the sole manufacturer and seller of computing mechanisms other than Veeder, to forever

acknowledge the validity of the Jauch patent, to submit all patents on computer pumps and computing mechanisms owned

or controlled by Neptune to uses determined by Wayne, to refrain from manufacturing computing mechanisms except with the approval of Wayne, and to refrain from selling computing mechanisms except to customers approved by Wayne, G & B, and Tokheim; that the defendants Wayne, G & B, and Tokheim share royalty payments secured from the aforesaid new licensees; that the defendants Wayne, G & B, and Tokheim share litigation expenses incurred in enforcing the terms of the aforesaid new licenses; that the defendant Wayne charge each of such new licensees with violations of its license, and under threat of cancellation of the license and imposition of liquidated damages, demand that each of such licensees accept a substitute license, and issue such license to each of said licensees on terms securing to Wayne, G & B, and Tokheim control of the ownership and official personnel of the licensee and protecting the Jauch patent in perpetuity; that the defendant Association, at meetings of its gasoline pump manufacturer members, consider ways and means of enforcing the provisions of the aforesaid licenses and the price and other regulations issued by Wayne as aforesaid; that the defendant Association at meetings of sales managers and salesmen employed by the defendant Wayne and its gasoline pump manufacturer licensees instruct, persuade, and compel such persons to adhere to the prices, discounts, commissions, terms, and conditions for the sale of computer pumps agreed upon by the defendants Wayne, G & B, and Tokheim; that the defendant Association urge and compel jobbers to adhere to the resale prices on computer pumps agreed upon by defendants Wayne, G & B, and Tokheim; and that the defendant Association collect and transmit to the other defendants information relating to the sales and prices of computer pumps.

28. For the purpose of effectuating the aforesaid combination and conspiracy the defendants have regularly and continuously entered into those agreements and done those things which, as hereinbefore alleged, they have combined and conspired to do and more particularly have done, among other, the following acts and things:

The defendant Tokheim during 1934 gave its consent to the licensing by Wayne under the Jauch patent of gasoline pump manufacturers purchasing Neptune's computing mechanism and gasoline pump manufacturers using computing mechanisms of their own make in the manufacture of computer pumps. In giving such consent the Board of Directors of defendant Tokheim passed a resolution on or about November 10, 1934, stating "That we consent to a licensing arrangement to other companies only under terms that will admit of price control * * *." This

resolution was passed after C. M. Niezer, Chairman of the Board of Directors, had "brought to the attention of the Board the rather delicate status of the Computer situation, with reference, particularly, to doubtful claims in the Wayne Company patent," under which Tokheim was licensed.

The defendant Wayne, with the consent of G & B and Tokheim, on or about January 2, 1935 issued a license under the Jauch patent to John Wood Manufacturing Company, Inc., a gasoline pump manufacturer using computing mechanisms of its own make in the manufacture of computer pumps, which was substantially similar to other licenses issued at approximately the same time to gasoline pump manufacturers purchasing Neptune computing mechanisms, and contained the following terms and conditions, among others: that the licensee acknowledge the validity of the Jauch patent; that all patents on computing

mechanisms and computer pumps and improvements thereon owned or controlled by the licensee be subject to uses determined by the defendant Wayne; that the licensee refrain from using computing mechanisms to convert noncomputer pumps into computer pumps and from selling computing mechanisms for such purpose; that the licensee purchase computing mechanisms only from Veeder unless an exception was allowed by Wayne; that the licensee adhere to the prices, discounts, commissions, terms, and conditions for the sale of computer pumps determined by Wayne; that Wayne have the right to enforce adherence to the aforesaid terms and conditions by imposing liquidated damages or by cancellation of the license or both and by withdrawing from the licensee permission to purchase computing mechanisms from Veeder; that the licensee make certain royalty payments to Wayne.

Prior to the grant of such license the United States Patent Office had declared a patent on computing mechanisms controlled by John Wood Manufacturing Company, Inc. to be in interference with the Jauch patent. Wayne, as a condition to the grant of a license to the John Wood company, required such licensee to cause to be filed in the United States Patent Office a concession of priority to the Jauch patent, which concession was filed in said Office in January 1935.

In or about June 1935 the defendant Wayne, with the consent of G & B and Tokheim, offered Neptune a license under the terms of which Neptune would acknowledge the validity of the Jauch patent, refrain from selling computing mechanisms to other companies except with the permission of Wayne, G & B, and Tokheim, and would permit all patents on computing mechanisms and computer pumps and improvements thereon, then owned or controlled or thereafter owned or controlled by Neptune, to be

subject to uses determined by the defendant Wayne. Neptune refused such license. Wayne in or about June 1935 offered to sell the Jauch and other patents on computing mechanisms and computer pumps owned or controlled by Wayne to Neptune

20 on condition that Neptune would thereafter administer the licenses already issued under the Jauch patent on terms and conditions, including price control, established by the defendant Wayne. Such offer was refused by Neptune. During 1935 the defendant Wayne, with the approval of G & B and Tokheim, instituted infringement proceedings against a user of a computer pump embodying a Neptune computing mechanism. Such suit was defended by Neptune. Wayne and Neptune during 1937 entered into a settlement of such suit, which settlement contained the following terms and conditions, among others: that Neptune acknowledge the validity of the Jauch patent in perpetuity; that all patents on computing mechanisms and computer pumps owned or controlled and thereafter acquired by Neptune be subject to uses determined by Wayne; that Neptune refrain from manufacturing computing mechanisms except with the approval of Wayne; that Neptune sell no computing mechanisms except to customers approved by Wayne, G & B, and Tokheim; that Neptune require a licensee of Wayne whose stock was controlled by Neptune to accept a substitute license under the terms of which said licensee would acknowledge the validity of the Jauch patent in perpetuity, would permit Wayne to fix or eliminate discounts to jobbers and would permit Wayne to cancel said license in the event of specified changes in the ownership of said licensee. The substitute license agreement required of such licensee was executed during 1937. Since the execution of the aforesaid agreement between Wayne and Neptune the defendant Wayne has refused to license other gasoline pump manufacturers under the Jauch patent and the defendant Veeder has refused to supply computing mechanisms to any gasoline pump manufacturer except Wayne, G & B, Tokheim, and Wayne's other licensees.

During 1938 Wayne conducted an audit of the books of its licensees, threatened licensees other than G & B and Tokheim with the imposition of liquidated damages and with cancellation of their licenses for alleged violations thereof, 21 and demanded that the licensees other than G & B and Tokheim enter into new license agreements. With the exception of Martin & Schwartz, Inc., such licensees other than G & B and Tokheim during 1938 entered into substantially similar substitute license agreements with defendant Wayne under the Jauch patent. These substituted licenses in addition to many of the clauses contained in the previous agreements contained clauses

providing that the licensee acknowledge the validity of the Jauch patent in perpetuity, that the licensee grant to Wayne the right to fix or eliminate discounts to jobbers, that the licensee grant to Wayne the right to cancel the license in the event of specified changes in the ownership or management of the licensee, and that improvements on computer pumps developed by the licensee which might be required by State Sealers or Fire Underwriters, not be submitted to such State Sealers or Fire Underwriters except by Wayne or with Wayne's express approval.

In or about June 1938 Wayne issued regulations to its licensees eliminating discounts to jobbers.

The defendant Wayne through regulations issued to its licensees, has established from time to time the following maximum commissions payable to salesmen of computer pumps:

January 3, 1935, 25 per cent.

August 1, 1935, 22½ per cent.

January 1, 1937, 17½ per cent.

January 1, 1939, 15 per cent.

January 1, 1941, 10 per cent.

During 1939 the defendant Wayne cancelled the license agreement of the smallest of its licensees and Veeder thereafter refused to sell computing mechanisms to such licensee without specific authorization from Wayne.

29. The combination and conspiracy hereinbefore described was intended to have and did have the following effects,
22 among others: the defendants have from time to time reduced the commissions paid to salesmen of computer pumps, thereby reducing the income of such salesmen; have eliminated discounts to jobbers, thereby eliminating such jobbers from the business of buying and selling computer pumps; have prevented and controlled changes in the management and ownership of Wayne's gasoline pump manufacturer licensees other than defendants G & B and Tokheim; have eliminated from the gasoline pump manufacturing field many manufacturers of gasoline pumps; have prevented the use of computing mechanisms to modernize noncomputer pumps; have secured control of all manufacturing sources of computing mechanisms in the United States; have secured ownership or control of all patents pertaining to computing mechanisms and computer pumps; have restricted the manufacture of computing mechanisms to the defendant Veeder; have restricted the manufacture of computer pumps to the defendant Wayne and its gasoline pump manufacturer licensees; have restricted the purchase of computing mechanisms for use in manufacturing computer pumps to Wayne and its licensees; have prevented the institution and continuation of litigation

threatening the validity of the Jauch patent; have suppressed competition in the development, acquisition, and use of inventions and patents relating to computing mechanisms and computer pumps; have fixed arbitrary, artificial, and noncompetitive prices for the sale of computer pumps; and have in these and other ways restrained interstate trade and commerce in computer pumps.

VIII. JURISDICTION AND VENUE

30. The combination and conspiracy hereinbefore alleged has operated and has been carried out within the Eastern Division of the Northern District of Illinois. Among other acts committed in the Eastern Division of the Northern District of Illinois by the defendants herein pursuant to the combination and conspiracy herein alleged and in furtherance thereof, during the period of time covered by this indictment and within three years preceding the date of the return of this indictment, were the following:

The defendants Wayne, G & B, and Tokheim have continuously solicited orders in the City of Chicago for computer pumps at the prices and upon the terms and conditions established by the said combination and conspiracy and have sold and shipped such computer pumps at such prices, terms, and conditions from the States of Indiana and Massachusetts to customers in the City of Chicago.

The defendants Wayne, G & B, and Tokheim have since in or about June 1938 prevented jobbers in the City of Chicago from buying computer pumps manufactured without the State of Illinois and from selling such computer pumps within the City of Chicago.

The defendants Wayne, G & B, and Tokheim have continuously restricted the commissions payable to Chicago salesmen of computer pumps manufactured without the State of Illinois and shipped into and sold by such salesmen within the City of Chicago.

The defendant Geyer on behalf of defendant Wayne in or about December 1938 participated in meetings and conferences held within the City of Chicago relative to the execution of new license agreements between Wayne and its licensee John Wood Manufacturing Company, Inc. and in furtherance of the hereinbefore alleged combination and conspiracy.

The defendant Geyer on behalf of defendant Wayne in or about July 1938 participated in meetings and conferences held within the City of Chicago relative to the execution of new

license agreements between defendant Wayne and its licensee the Southwest Pump Company and in furtherance of the hereinbefore alleged combination and conspiracy.

Representatives of the defendant Wayne in or about November 1939 participated in meetings and conferences with the Neptune Meter Company relative to the imposition of liquidated damages upon said Company and attempted at said meetings and conferences to induce the Neptune Meter Company to enter into further license agreements in furtherance of the aforesaid combination and conspiracy.

The defendant Geyer on behalf of defendant Wayne in or about June 1938 participated in meetings and conferences held within the City of Chicago relative to the acquisition of special rights under patents for use in connection with the operation of computer pumps.

And so the Grand Jurors aforesaid, upon their oaths aforesaid, do present that the defendants named, at the time and place and in the manner aforesaid, unlawfully have engaged in a continuing combination and conspiracy in restraint of trade and commerce in computer pumps among the several States of the United States contrary to the form of the statute of the United States in such case provided and against the peace and dignity of the United States of America.

(s) LEO F. TIERNEY,
Leo F. Tierney,

(s) DANIEL B. BRITT,
Daniel B. Britt,

Special Assistants to the Attorney General.

(s) WILLIS L. HOTCHKISS,
Willis L. Hotchkiss,

(s) JAMES C. CRAMOND,
James C. Cramond,

Special Attorneys.

(s) THURMAN ARNOLD,
Thurman Arnold,

Assistant Attorney General.

(s) PAUL D. PAGE, JR.,
Paul D. Page, Jr.,

Special Assistant to the Attorney General.

(s) J. ALBERT WOLL,
J. Albert Woll,

United States Attorney.

25 Indictment. Violation of Section One of the Act of July 2, 1890 (U. S. C. A., Title 15, Sec. 1). A true bill, R. W. Barron, Foreman. Filed in open court this 31st day of January A. D. 1941. Hoyt King, Clerk.

26 In District Court of the United States

[Title omitted.]

Demurrer of Defendant Tokheim Oil Tank and Pump Company, a corporation, to the said indictment

(Filed March 29, 1941)

Now comes Tokheim Oil Tank and Pump Company, a corporation, defendant in the above-entitled cause, by Ballard Moore, Louis F. Niezer, and Harold W. Norman, its attorneys, and demurs to the indictment and says that the said indictment and the matters therein contained in substance and in form as the same are therein alleged and set forth, are not sufficient in law to require this defendant to plead to said indictment or to answer the same, and that said indictment is insufficient in law to sustain a judgment against this defendant, and for grounds of said demurrer shows:

1. Said indictment, in violation of the rights guaranteed to said defendant by the Fifth and Sixth Amendments to the Constitution of the United States, fails to describe and particularize the offense attempted to be charged therein with sufficient definiteness, certainty and specificity to inform it of the nature and cause of the accusation, to enable it to prepare and make its defense thereto, and to enable it to plead an acquittal or a conviction thereunder in bar of any other proceedings against it based on the matters or things, or any of them, on which said indictment is based.

2. The averments of said indictment purporting to charge a combination and conspiracy in restraint of trade are mere conclusions.

3. Said indictment fails to make averments sufficient to identify and describe the supposed combination and conspiracy, in that it does not allege with particularity any of the following:

(a) The factual basis upon which the United States relies for its charge that a combination and conspiracy exists or has existed;

(b) The manner of formation of the supposed combination and conspiracy;

(c) The terms of the supposed combination and conspiracy; or

(d). The manner in and by which it is claimed that said defendants became parties to the supposed combination or conspiracy.

4. The allegations in said indictment with respect to the supposed combination and conspiracy in restraint of trade, and to the intended means for the accomplishment thereof, are so vague, indefinite, uncertain, and conclusory in character as to fail to apprise this defendant of the manner in which the prosecution claims that it has violated the law pertaining to combination or conspiracy in restraint of trade among the several states.

28 Because certain defects are specified herein, it is not intended that any other defects, omissions, or imperfections are waived, and the same are hereby insisted upon with like effect as if the same were herein set forth and enumerated.

For all of which causes of demurrer existing, this defendant says that said alleged indictment is demurrable and is not sufficient in substance or in form for it to make plea unto.

Wherefore this defendant prays that this demurrer be sustained and that said indictment be dismissed as to this defendant and that it go hence without day.

(Sgd.) BALLARD MOORE,

Ballard Moore,

(Sgd.) LOUIS F. NIEZER,

Louis F. Niezer,

(Sgd.) HAROLD W. NORMAN,

Harold W. Norman,

*Attorneys for Tokheim Oil Tank & Pump Company,
a corporation, defendant.*

20 In the District Court of the United States

[Title omitted.]

Joint and several demurrer of defendants The Wayne Pump Company, a corporation, and B. F. Geyer to the said indictment

Filed March 31, 1941

Now come The Wayne Pump Company, a corporation, and B. F. Geyer, defendants in the above entitled cause, by Edward R. Johnston, Charles L. Byron, and Howard Somervell, their attorneys, and jointly and severally demur to the indictment and say that the said indictment and the matters therein contained in substance and in form as the same are therein alleged and set forth are not sufficient in law to require these defendants, or

either of them, to plead to said indictment, or to answer the same, and that said indictment is insufficient in law to sustain a judgment against said defendants, or either of them; and for grounds of said demurrer show:

1. Said indictment, in violation of the rights guaranteed to said defendants by the Fifth and Sixth Amendments to the Constitution of the United States, fails to describe and particularize the offense attempted to be charged therein with sufficient definiteness, certainty and specificity to inform them of the nature and cause of the accusation, to enable them to prepare and make their defense thereto, and to enable them to plead an acquittal or a conviction thereunder in bar of any other proceedings against them based on the matters or things, or any of them, on which said indictment is based.

2. The averments of said indictment purporting to charge a combination and conspiracy in restraint of trade are mere conclusions.

3. Said indictment fails to make averments sufficient to identify and describe the supposed combination and conspiracy, in that it does not allege with particularity any of the following:

(a) The factual basis upon which the United States relies for its charge that a combination and conspiracy exists or has existed;

(b) The manner of formation of the supposed combination and conspiracy;

(c) The terms of the supposed combination and conspiracy; or

(d) The manner in and by which it is claimed that said defendants became parties to the supposed combination or conspiracy;

4. The allegations in said indictment with respect to the supposed combination and conspiracy in restraint of trade, and to the intended means for the accomplishment thereof, are so vague, indefinite, uncertain, and conclusory in character as to fail to apprise said defendants of the manner in which the prosecution claims that they have violated the law pertaining to combination or conspiracy in restraint of trade among the several states.

31 Because certain defects are specified herein, it is not intended that any other defects, omissions, or imperfections are waived, and the same are hereby insisted upon with like effect as if the same were herein set forth and enumerated.

For all of which causes of demurrer existing, these defendants jointly and severally say that said alleged indictment is demurrable and is not sufficient in substance or in form for them or either of them to make plea unto.

Wherefore these defendants jointly and severally pray that this demurrer be sustained and that said indictment be dismissed

as to these defendants and that they and each of them go hence without day.

(Sgd.) EDWARD R. JOHNSTON,

(Sgd.) CHARLES L. BYRON,

(Sgd.) HOWARD SOMERVELL,

Attorneys for said Defendants.

32 In District Court of the United States

Joint and several demurrer of the Defendants Gilbert & Barker Manufacturing Company, a Corporation, and S. C. Hope

Filed March 31, 1941

Now come the defendants Gilbert & Barker Manufacturing Company, a corporation, and S. C. Hope, by James H. Winston, John C. Slade, and George W. Ott, their attorneys, and say that said indictment and the matters therein contained, in substance and in form as the same are therein alleged and set forth, are insufficient in law to require these defendants, or either of them, to plead to said indictment or to answer the same, and say that said indictment is insufficient in law to sustain a judgment against said defendants or either of them; and, without intending to waive any other substantial causes of demurrer by the enumeration of the following specific causes, further demur to said indictment upon the following grounds:

(1) The allegations in said indictment are so vague, indefinite, and uncertain as to fail to apprise these defendants, or
33 either of them, of the nature of the charges against them or in what manner they, or either of them, have violated the law pertaining to combination or conspiracy in restraint of trade between the several States, or to exhibit to them facts so that they, or either of them, may know the nature of the charges against them sufficiently to prepare their defense.

(2) The averments of said indictment purporting to charge a combination and conspiracy in restraint of trade are mere conclusions, and said indictment fails to state acts and things essential to inform these defendants as to the supposed combination and conspiracy under said Section 1 of the Sherman Act.

(3) The said indictment fails to make averments sufficient to identify the supposed combination and conspiracy in that it does not allege with particularity any of the following:

(a) The manner of formation of the supposed combination and conspiracy, or any factual basis for the Government's theory that a combination and conspiracy exists or has existed;

(b) The terms of the supposed combination and conspiracy; or

(c) The occurrence, transaction, or other test whereby the defendants may determine the Government's theory as to the

existence of any combination or conspiracy, or whereby to determine the Government's theory as to what were the
 34 acts or events that put these defendants into the supposed combination or conspiracy.

(4) The said indictment fails to aver ultimate facts as distinguished from mere conclusions of the pleader, sufficient to inform the Court as to the supposed conspiracy under Section 1 of the Sherman Act.

(5) Although said indictment charges as a mere conclusion that there was and is a combination and conspiracy, said indictment significantly fails to allege that the defendant Gilbert & Barker Manufacturing Company or the defendant S. C. Hope, as its officer, agreed with, or acted in concert with, any corporation or persons whatsoever to do any of the things mentioned in said indictment other than to the extent involved in the taking by Gilbert & Barker Manufacturing Company of a license under the Jauch Patent from said Wayne Pump Company.

(6) The said indictment denies to these defendants the right guaranteed to them under the Fifth and Sixth Amendments to the Constitution of the United States, in that it fails to be an indictment returned by a Grand Jury which informs them of the nature and cause of the accusation.

For all of which causes of demurrer existing, these defendants jointly and severally say that said alleged indictment is demurrable and is not sufficient in law for them, or either of them, to make plea unto.

35 Wherefore, these defendants jointly and severally pray that this demurrer be sustained and that said indictment be dismissed as to these defendants, and that they, and each of them, go hence without day.

JAMES H. WINSTON,
 JOHN C. SLADE,
 GEORGE W. OTT.

*Attorneys for Gilbert & Barker Manufacturing Company,
 a corporation, and S. C. Hope, Defendants.*

36

In District Court of the United States

[Title omitted.]

Joint and several demurrer of Defendants Veeder-Root, Incorporated, a Corporation, G. H. Anthony and J. H. Chaplin to the said indictment

Filed March 31, 1941

Now come Veeder-Root, Incorporated, a corporation, G. H. Anthony and J. H. Chaplin, defendants in the above-entitled

cause, by Harold F. McGuire, James M. Carlisle, and Arthur S. Lytton, their attorneys, and jointly and severally demur to the indictment and say that the said indictment and the matters therein contained in substance, and in form as the same are therein alleged and set forth are not sufficient in law to require these defendants, or any of them, to plead to said indictment, or to answer the same, and that said indictment is insufficient in law to sustain a judgment against said defendants, or any of them, and for grounds of said demurrer show:

1. Said indictment, in violation of the rights guaranteed to said defendants by the Fifth and Sixth Amendments to the Constitution of the United States, fails to describe and
37 particularize the offense attempted to be charged therein with sufficient definiteness, certainty and specificity to inform them of the nature and cause of the accusation to enable them to prepare and make their defense thereto and to enable them to plead an acquittal or a conviction thereunder in bar of any other proceedings against them based on the matters or things, or any of them, on which said indictment is based.

2. The averments of said indictment purporting to charge a combination and conspiracy in restraint of trade are mere conclusions.

3. Said indictment fails to make averments sufficient to identify and describe the supposed combination and conspiracy, in that it does not allege with particularity any of the following:

(a) The factual basis upon which the United States relies for its charge that a combination and conspiracy exists or has existed;

(b) The manner of formation of the supposed combination and conspiracy;

(c) The terms of the supposed combination and conspiracy; or

(d) The manner in and by which it is claimed that said defendants became parties to the supposed combination or conspiracy.

4. The allegations in said indictment with respect to the supposed combination and conspiracy in restraint of trade, and to the intended means and for the accomplishment thereof, are so vague, indefinite, uncertain, and conclusory in character as to fail to apprise said defendants of the manner in which the prosecution claims that they have violated the law pertaining to combination or conspiracy in restraint of trade among the several states.

38 Because certain defects are specified herein, it is not intended that any other defects, omissions, or imperfec-

tions are waived, and the same are hereby insisted upon with like effect as if the same were herein set forth and enumerated.

For all of which causes of demurrer existing, these defendants jointly and severally say that said alleged indictment is demurrable and is not sufficient in substance or in form for them or either of them to make plea unto.

Wherefore these defendants jointly and severally pray that this demurrer be sustained and that said indictment be dismissed as to these defendants and that they and each of them go hence without day.

JAMES M. CARLISLE.
HAROLD F. MCGUIRE.
- ARTHUR S. LYTTON.

39 In District Court of the United States.

[Title omitted.]

Joint and several demurrer of the defendants, Gasoline Pump Manufacturers Association (an Unincorporated Association) and G. Denny Moore

Filed April 4, 1941

Now come Gasoline Pump Manufacturers Association, an unincorporated association, and G. Denny Moore, defendants in the above entitled cause, by Barry Gilbert, their attorney, and jointly and severally demur to the indictment and say that the said indictment and the matters therein contained in substance and in form as the same are therein alleged and set forth are not sufficient in law for them, or either of them, to be required to plead thereto, and for grounds of said demurrer show:

1. Said indictment, in violation of the rights guaranteed to said defendants by the Fifth and Sixth Amendments to the Constitution of the United States, fails to describe and particularize the offense attempted to be charged therein with sufficient definiteness, specifcness, and certainty to inform them of the nature and cause of the accusation, to enable them to prepare and make their defense thereto, and to enable them to plead an acquittal or a conviction thereunder, in bar of any other proceedings against them based on the matters or things, or any of them, on which said indictment is based.

2. The averments of said indictment purporting to charge a combination and conspiracy in restraint of trade are mere con-

clusions, and said indictment fails to state acts and things essential to inform these defendants as to the supposed combination and conspiracy under said Section 1 of the Sherman Act.

3. Said indictment fails to make averments sufficient to identify and describe the supposed combination and conspiracy, in that it does not allege with particularity any of the following:

(a) The factual basis upon which the United States relies for its charge that a combination and conspiracy exists or has existed;

(b) The manner of formation of the supposed combination and conspiracy;

(c) The terms of the supposed combination and conspiracy; or

(d) The manner in and by which it is claimed that said defendants became parties to the supposed combination or conspiracy.

4. The allegations in said indictment with respect to the supposed combination and conspiracy in restraint of trade, and to the intended means for the accomplishment thereof, are

41 so vague, indefinite, and uncertain in character as to fail to apprise said defendants of the manner in which the prosecution claims that they have violated the law pertaining to combination or conspiracy in restraint of trade among the several states.

5. The said indictment fails to aver ultimate facts as distinguished from mere conclusions of the pleader, sufficient to apprise said defendants of the manner in which the prosecution claims that they have violated the law pertaining to combination or conspiracy in restraint of trade among the several states.

Because certain defects are specified herein, it is not intended that any defects, omissions, or imperfections are waived, and the same are hereby insisted upon with like effect as if the same were herein set forth and enumerated.

For all of which causes of demurrer existing, these defendants jointly and severally say that said alleged indictment is demurrable and is not sufficient in substance or in form for them or either of them to make plea unto.

Wherefore these defendants jointly and severally pray that this demurrer be sustained and that said indictment be dismissed as to these defendants and that they and each of them go hence without day.

(Sgd.) BARRY GILBERT,
Attorney for said Defendants.

42 In the District Court of the United States for the Northern
District of Illinois, Eastern Division

Indictment No. 32597-

UNITED STATES OF AMERICA

v.

THE WAYNE PUMP COMPANY, ET AL.

Indictment No. 32598

UNITED STATES OF AMERICA

v.

THE WAYNE PUMP COMPANY, ET AL.

Opinion

Filed Feb. 24, 1942

The two above indictments were returned on January 31st, 1941.

Indictment No. 32597, known as the price fixing indictment, names as defendants four corporations: The Wayne Pump Company, a Maryland corporation; Gilbert & Barker Manufacturing Company, a Massachusetts corporation; Tokheim Oil Tank & Pump Company, an Indiana corporation; and Veeder-Root, Inc., a Connecticut corporation; one unincorporated association, the Gasoline Pump Manufacturers Association, its membership being composed of gasoline pump manufacturers, including Wayne Pump Company, G. & B. and Tokheim; and five individuals, who are officers of the various corporations, and charges them with having entered into and engaged in a combination and conspiracy to fix, maintain and control the prices of gasoline computer pumps in interstate commerce, in violation of Section 1 of the Sherman Act (15 U. S. C. A. 1).

Indictment No. 32597, known as the monopoly indictment in count one charges the four corporations and four of the individuals named in indictment No. 32597 with having entered into and engaged in a combination and conspiracy to monopolize the manufacture and sale of computer pumps; and in count two with having entered into and engaged in a combination and conspiracy to monopolize the manufacture and sale of computer mechanisms in interstate commerce, in violation of Section 2 of the Sherman Act (15 U. S. C. A. 2).

The indictments cover a period of time beginning in 1932 and continuing to the time of the return of the indictments, and set out that the acts alleged in the indictments were performed within three years next preceding the date of the return of the indictments.

The following terms are used and defined in the indictments:

"Gasoline pump" shall be deemed to refer to any pump designed to dispense gasoline.

"Computing mechanism" shall be deemed to refer to any mechanical device which may be used in connection with a gasoline pump, that simultaneously calculates and registers quantities and prices of gasoline dispensed by such pumps. The term "computing mechanism" shall also be deemed to include any mechanical device which may be used for varying the operation

43 of a price register in a computing mechanism to enable such register to indicate calculated prices corresponding with selective changes made in the unit price of the gasoline being dispensed.

"Computer pump" shall be deemed to refer to a gasoline pump embodying a computing mechanism.

"Noncomputer pump" shall be deemed to refer to any gasoline pump other than a computer pump.

"Patent" shall be deemed to refer to applications for letters patent, applications for reissues of letters patent, as well as to patents.

The defendants, The Wayne Pump Company (hereinafter referred to as Wayne Pump Company), Gilbert & Barker Manufacturing Company (hereinafter referred to as G. & B.), and Tokheim Oil Tank & Pump Company (hereinafter referred to as Tokheim), are engaged in the manufacture of computer pumps. Defendant Veeder-Root, Inc. (hereinafter referred to as Veeder) is engaged in the manufacture of computing mechanisms. Defendant Gasoline Pump Manufacturers Association (hereinafter referred to as The Association) is a trade association whose membership consists, according to the indictment, "for the most part of gasoline pump manufacturers." The individual defendants named in the indictments are officers of the four corporations, and one employee of The Association.

C. M. Niezer, a resident of Fort Wayne, Indiana, who has been president of Tokheim during the period of time covered by these indictments, is named as a coconspirator therein, but is not indicted. The indictments charge that during the period of time covered by them this coconspirator has been actively engaged in the management of Tokheim, and has conferred with the various defendants and with others, and has participated in the activities constituting the offenses charged in the indictments.

The indictments also charge that from 1932 to 1937 the Wayne Pump Company owned the stock of Wayne Company, an Indiana corporation, which was engaged in manufacturing and selling gasoline pumps, and acquired ownership and control of certain patents pertaining to computer pumps and computing mechanisms and entered into license agreements with reference to such patents. That the president of Wayne Pump Company during said period was vice president of the Wayne Company, and the Vice President of the Wayne Pump Company was president of the Wayne Company, and that Wayne Pump Company controlled the policies of the Wayne Company during that period. That in 1937 the Wayne Pump Company took over the assets, including the patents and licenses issued under them, and since that time has been directly engaged in manufacturing and selling gasoline pumps, and that the Wayne Company has ceased to manufacture or sell gasoline pumps.

44 Paragraphs 13 to 25, inclusive of the indictments describe the nature of the trade and commerce involved, and set out that:

"13. The use of gasoline pumps is essential to the proper supply of gasoline to the millions of passenger cars and trucks operating on the highways of the United States. Changes in types of gasoline pumps have paralleled the major changes and improvements in the manufacture of automobiles. The earliest type of gasoline pump pumped gasoline out of one container into another container which acted as a measuring device. Later a gasoline pump was developed to measure a designated quantity of gasoline with a single stroke of the pumping handle. During the middle part of the twenties the so-called visible type of pump appeared on the market. On the top of the visible pump rested a large graduated glass bowl. The required amount of gasoline was pumped into this bowl, usually by hand, and was then dispensed to the customer by permitting gravity to carry the gasoline from the bowl to the gasoline tank in the motor vehicle. During the latter part of the twenties a great advance in gasoline pump construction was made in the development of the so-called meter pumps. This pump, operated either by hand or by electricity, contained in addition to the pump, a meter for measuring the quantity of gasoline. The quantity was then registered by means of pointers revolving around a clock type dial placed above the meter.

"14. In 1933 the first computer pump was placed on the market and due to public demand, aided by an energetic marketing program, such pumps have since that date largely supplanted the noncomputer pump. The computer pump was greatly favored by the public because the customer was able to see at a glance

both the price and the quantity of the gasoline he had purchased. The shift in public demand from noncomputer pumps to computer pumps has been so marked that for several years it has been all but impossible for any gasoline pump manufacturer to continue to engage in such business unless he manufactured computer pumps."

A table is then given showing this shift in sales from non-computer to computer pumps, from 1931 to 1939.

"16. The magnitude of the industry is shown by the fact that there are approximately 1,300,000 gasoline pumps in use in the United States and approximately 100,000 gasoline pumps are sold in the United States each year, by gasoline pump manufacturers.

"17. Prior to 1932, and during the period of time covered by this indictment, numerous applications for letters patent have been filed in the United States Patent Office on computer pumps, computing mechanisms, and improvements on computer pumps and computing mechanisms, and the United States Patent Office has issued numerous patents on such subjects. On or about November 22, 1932, the United States Patent Office issued a patent known as the 'Jauch Patent' on a computer pump. The Jauch Patent was issued by the Patent Office to certain employees of the Wayne Pump Company who immediately assigned the

45 said Jauch Patent to the Wayne Company. Under said Jauch patent and other patents issued as hereinafter described the defendant Wayne has licensed certain other gasoline pump manufacturers to make, use, and sell computer pumps, as hereinafter alleged.

"18. An indispensable element of every computer pump is the computer mechanism. Without a source of supply of such mechanisms a manufacturer cannot make computer pumps.

19. The defendant Wayne, both before and after the issuance of the Jauch patent, entered into certain arrangements and understandings with defendant Veeder, as hereinbefore alleged, whereby the manufacturing and other facilities and patents of the defendant Veeder were to be utilized in the development of a commercially feasible computing mechanism. The defendant Veeder developed such a mechanism and during the period of time covered by this indictment has manufactured such mechanisms and has sold such mechanisms in interstate trade and commerce, for use in computer pumps, only to defendants Wayne, G & B, and Tokheim, and such other manufacturers of gasoline pumps as are permitted by Wayne, G & B, and Tokheim to purchase computing mechanisms from Veeder.

"20. The defendant Veeder manufactures computing mechanisms in the State of Connecticut and sells and ships such mecha-

nisms to gasoline pump manufactures in the States of Indiana, Massachusetts, Pennsylvania, Texas, and other states of the United States where computer pumps are manufactured. Such gasoline pump manufacturers including defendants Wayne, G & B, and Tokheim, sell and ship computer pumps from their plants to customers located in other states of the United States, including customers in the Eastern Division of the Northern District of Illinois.

"21. During the period of time covered by this indictment the Neptune Meter Company (sometimes hereinafter referred to as "Neptune") manufactured computing mechanisms in the State of New York and sold and shipped such mechanisms to numerous manufacturers of gasoline pumps, other than defendants Wayne, G & B, and Tokheim, located in states other than New York, who used such computing mechanisms in the manufacture of computing pumps which were sold and shipped by such manufacturers to customers located in states other than where the computer pumps were manufactured. Such pumps were sold in competition with those manufactured by the defendant Wayne and its licensees, including G & B and Tokheim.

"22. During the same period of time other gasoline pump manufacturers produced computing mechanisms which were used in computer pumps of their own make which were sold and shipped to customers located in states other than where the pumps were manufactured, in competition with the computer pumps manufactured by the defendant Wayne and its licensees, including G & B and Tokheim, and in competition with the computer pumps manufactured by companies purchasing computing mechanisms from Neptune.

46 "23. Since the year 1938, however, the defendant Veeder has been the sole manufacturer in the United States of computing mechanisms used in computer pumps and the only available source of computing mechanisms used by manufacturers in the making of computer pumps.

"24. The defendants Wayne, G & B, and Tokheim, during the period covered by this indictment, have been the three leading manufacturers of gasoline pumps in the United States. In 1939 such defendants manufactured and sold computer pumps constituting 56% of the value of all computer pumps sold in the United States, while Wayne, G & B, and Tokheim, with the other eight manufacturers licensed by Wayne, with the consent of G & B and Tokheim, to buy computing mechanisms from defendant Veeder and make computer pumps, manufactured and sold 100 per cent of the computer pumps made and sold in the United States. In the same year gasoline pumps of all types manufac-

tured by Wayne and its licensees constituted approximately 99 per cent of the value of all gasoline pumps manufactured and sold in the United States. In 1931, prior to the introduction of computer pumps, there were approximately thirty manufacturers of gasoline pumps in the United States.

"25. Most of the computer pumps manufactured by defendants Wayne, G & B, and Tokheim and other manufacturers are sold in interstate trade and commerce to major oil companies and to independent gasoline station operators for installation in gasoline filling stations throughout the United States."

The indictments set out the combination and conspiracy, first in the price-fixing indictment, charging that all of the defendants—

"* * * well knowing all of the facts alleged in this indictment, beginning in or about the year 1932 * * * and continuously thereafter up to and including the date of the presentation of this indictment knowingly have entered into and engaged in a combination and conspiracy to fix, maintain and control arbitrary, artificial and noncompetitive prices for the sale of computer pumps in the aforesaid interstate trade and commerce, which combination and conspiracy, in fact, has been and is now in restraint of trade and commerce in violation of Section 1 of the Act of Congress of July 2, 1890 * * * commonly known as the Sherman Act; which combination and conspiracy is now described in further detail, that is to say:"

Thirty separate acts or means are then enumerated which are alleged to be "a part of said combination and conspiracy."

The indictment finally alleges that the defendants entered into the agreements and did the things they combined and conspired to do, and specifies in detail certain overt acts.

The monopoly indictment charges in count one that all of the defendants—

"* * * well knowing all of the facts alleged in this indictment, beginning in or about the year 1932 * * * and continuously thereafter up to and including the date of the presentation of this indictment, knowingly have entered into and engaged in an unlawful combination and conspiracy to monopolize the manufacture and sale of computer pumps in the aforesaid interstate trade and commerce, which combination and conspiracy in fact has been and is now in violation of Section 2 of the Act of Congress * * * commonly known as the Sherman Act; which combination and conspiracy is now described in further detail, that is to say:"

47 Twenty separate acts or means are then enumerated which are alleged to be "a part of said combination and conspiracy."

Count two charges that all of the defendants "knowingly have entered into and engaged in an unlawful combination and conspiracy to monopolize the manufacture and sale of computing mechanisms" in violation of Section 2 of the Sherman Act. Nineteen separate acts or means are enumerated which are alleged to be "a part of said combination and conspiracy."

Demurrers, supported by briefs, have been filed on behalf of all of the defendants, and answering briefs have been filed on behalf of the Government.

The demurrers challenge the sufficiency of the indictments on the ground that they fail to describe the alleged conspiracies and combinations with which defendants are charged so as to inform them of the nature and cause of the accusations against them and enable them to properly prepare their defenses.

The cases are before me now for disposition on these demurrers.

48 SULLIVAN, District Judge, after stating the facts as above:

Two indictments have been returned against these defendants. In indictment No. 32597 they are charged with combining and conspiring "to fix, maintain and control arbitrary, artificial, and noncompetitive prices for the sale of computer pumps" in interstate commerce in violation of Section 1 of the Sherman Act. In indictment No. 32598 defendants are charged with combining and conspiring to monopolize the manufacture and sale of computing mechanisms in interstate commerce, in violation of Section 2 of the Sherman Act. Defendants Wayne Pump Company, G & B, and Tokheim are manufacturers of computer pumps, and defendant Veeder is a manufacturer of computing mechanisms. Computer pumps and computer mechanisms, the subject matter of both the price fixing and the monopoly indictments, are covered by patents issued by the United States.

The indictments set out that the development of gasoline pumps has paralleled the major changes and improvements in the manufacture of automobiles; that from a rather crude beginning the type of gasoline pump in general was improved from time to time; that prior to 1932, however, a pump had not been developed which would automatically calculate and register both the quantities and prices of the gasoline dispensed.

On November 22, 1932, the United States patent office issued to one Jauch, an employee of the Wayne Pump Company, a patent covering the computer pump, which was subsequently assigned to the Wayne Company. The indictments set out that this patent revolutionized the gasoline pump business, and that as soon as computer pumps were placed on the market they superseded all other types of pump, so that by 1939 they represented

over 90% in value of gasoline pumps manufactured and sold in this country.. That the computer pump was greatly favored by the public because the customer was able to see at a glance both the price and quantity of the gasoline he had purchased, and that so great has been the shift in public demand from noncomputer pumps to computer pumps that for several years it has been all but impossible for any gasoline pump manufacturer to continue in business unless he manufactured computer pumps.

Following the grant of the Jauch patent and the commercial development of the computer pump manufactured thereunder, it appears that the Wayne Pump Company granted licenses to G & B and Tokheim to make, use and sell computer pumps. The indictments set out that at a later period, when the computer pump became a success and the public demand for it became great, the Wayne Company granted licenses to eight other pump manufacturers. As owner of the patent the Wayne Company had the right to grant these licenses on its own terms and conditions, just as it had a right to completely exclude all others from making, using or selling computer pumps for the time prescribed in the statute, provided only that in so doing it did not violate any other law.

49 In the case of Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co., 154 Federal, 358, a patentee's rights were challenged under the Sherman Act. In sustaining the patentee's rights Judge Baker (C. C. A. 7th Circuit) said:

"Under its constitutional right to legislate for the promotion of the useful arts, Congress passed the patent statutes. The public policy thereby declared is this: Inventive minds may fail to produce many useful things that they would produce if stimulated by the promise of a substantial reward; what is produced is the property of the inventor; he and his heirs and assigns may hold it as a secret until the end of time; the public would be largely benefited by obtaining conveyances of these new properties; so the people, through their representatives, say to the inventor: 'Deed us your property, possession to be yielded at the end of 17 years, and in the mean time we will protect you absolutely in the right to exclude every one from making, using, or vending the thing patented without your permission.' [Citing cases.] Congress put no limitation, excepting the time, upon the monopoly. Courts can create none without legislating. • • •

Use of the invention cannot be had except on the inventor's terms. Without paying or doing whatever he exacts no one can be exempted from his right to exclude. Whatever the terms, courts will enforce them, provided only that the licensee is not thereby required to violate some law outside of the patent law, like the doing of murder or arson."

In *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U. S. 405, the court said:

"The inventor is one who has discovered something of value. It is his absolute property. He may withhold a knowledge of it from the public, and he may insist upon all the advantages and benefits which the statute promises him who discloses to the public his invention.

"It (a review of prior cases) shows that whenever this court has had occasion to speak, it has decided that an inventor receives from a patent the right to exclude others from its use for the time prescribed in the statute. And for his exclusive enjoyment of it during that time the public faith is forever pledged."

In *Bement & Sons v. National Harrow Co.*, 186 U. S. 70, the owner of the patent granted a license to a manufacturer to manufacture harrows under the patent. The suit against the manufacturer was one to recover damages for a violation of licenses and to restrain further violations. Mr. Justice Peckham, in his opinion, rendered in 1902, said:

50 "But that statute (Sherman Anti-Trust Law) clearly does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and logical conditions imposed upon the assignee or licensee of a patent by the owner thereof restricting the terms upon which the article may be used, and the price to be demanded therefor. Such a construction of the Act, we have no doubt, was never contemplated by its framers.

"The owner of a patented article can, of course, charge such price as he may choose and the owner of a patent may assign it or sell the right to manufacture and sell the article patented upon the condition that the assignee shall charge a certain amount for such article."

In *United States v. General Electric Co.*, 272 U. S. 476, suit in equity was brought by the Government against the General Electric Company and the Westinghouse Electric Company to enjoin them from prosecuting a plan for the distribution and sale of patented electric lamps. The General Electric Company was the owner of patents on tungsten-filament-incandescent lamps, and in granting a license under its patents to the Westinghouse Company it fixed the price at which the Westinghouse Company could sell the patented lamps. After examining various cases on the subject, including *Bement v. National Harrow Co.*, supra, the Supreme Court said that the authority of the *Bement* case "has not been shaken by the cases we have reviewed." In dismissing the Government's bill and sustaining the right of the patentee-

licensee to fix prices and impose other conditions under which the licensee could make, use, and vend the patented article, the court said:

"The patentee may make and grant a license to another to make and use the patented articles, but withhold his right to sell them. The licensee in such a case acquires an interest in the articles made. But if he sells them he infringes the right of the patentee and may be held for damages and enjoined. If the patentee goes further, and licenses the selling of the article, may he limit the selling by limiting the method of sale and the price? We think he may do so, provided the conditions of sale are normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly. One of the valuable elements of the exclusive right of a patentee is to acquire profit by the price at which the article is sold. The higher the price, the greater the profit, unless it is prohibitory. When the patentee licenses another to make and vend, and retains the right to make and vend on his own account, the price at which his licensee will sell will necessarily affect the price at which he can sell his own patented goods. It would seem entirely reasonable that he should say to the licensee, 'Yes, you may make and sell the articles under my patent, but not so as to destroy the profit that I wish to obtain by making and selling them myself.'"

In *Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co.*, 154 Fed. 358, the Rubber Tire Wheel Company, owner of the Grant patent on rubber tire wheels, had granted a number of licenses under which it exacted royalties, fixed the price at which licensees could sell the patented product, and imposed other terms and conditions. Suit was brought by the licensor to collect royalties from the licensee, and the defense was set up that the license arrangement was unlawful under the Sherman Act. In reversing the lower court, the Circuit Court of Appeals for this Circuit held that the patentee-licensee had the right to fix prices on the patented article and to impose other conditions, and in sustaining the right of the licensor to recover its royalties, Judge Baker said:

"The only grant to the patentee was the right to exclude others, and to have and to hold for himself and his assigns a monopoly, not a right limited or conditioned according to the sentiment of judges, but an absolute monopoly constitutionally conferred by the sovereign lawmakers. Over and above an absolute monopoly created by law, how can there be a further and unlawful monopoly in the same thing. If plaintiff were the sole maker of Grant tires, how could plaintiff's control of prices and output injure the people, deprive them of something to which they have a right?

Is a greater injury or deprivation inflicted, if plaintiff authorizes a combination or pool to do what plaintiff can do directly? To say yes means that substance is disregarded, that mere words confer upon the people some sort of right or interest counter to the monopoly, when by the terms of the bargain the people agreed to claim none until Grant's deed to them shall have matured."

The indictments here charge the defendants' Wayne Pump Company, G & B, and Tokheim with "using the Jauch patent" for the purpose of fixing prices among themselves on the sales of computer pumps, and for the purpose of restricting the manufacture and sale of such pumps. There is no charge that defendants fixed the prices of gasoline pumps generally, or restricted their manufacture and sale. They are charged only with fixing the prices of computer pumps, a right which the Wayne Pump Company already had under the statutory monopoly granted by the Government when its patent was issued. What is meant by the phrase "used the Jauch patent" is not quite clear. If the defendants did more than enter into ordinary patent license agreements, under the terms of which the Wayne Pump Company, as owner of the patent, licensed the others to manufacture computer pumps, and fixed the prices at which the pumps should be sold; or if the Government claims that these defendants were involved in some offense under the Sherman Act other than the exercise of a patent monopoly, then such offense should be set out clearly in the indictments.

While ownership of the patent gives to the patentee a complete monopoly within the field of his patent, it of course does not give him any license to violate the provisions of the Sherman Act or of any other law. Under his monopoly he may not use his patent as a pretext for fixing prices on an unpatented article of commerce; nor fix the resale price on his patented article; nor make use of tying clauses." In the case of *United States v. Standard Sanitary Manufacturing Co.*, 226 U. S. 20, the patent owner and its licensees entered into a scheme for fixing prices on a common article of commerce—unpatented bath tubs—and then by a pretended use of a process patent attempted to evade the Sherman Act. This is obviously not the instant case, and the indictments do not allege that there was any understanding or agreement among the defendants to use the patent to fix prices on any unpatented article. In fact there is no allegation that there was any understanding or agreement among the defendants at all, aside from the allegation that they "knowingly have entered into and engaged in a combination and conspiracy to fix and maintain noncompetitive prices and to monopolize the manufacture and sale of computer pumps and computing mechanisms, by the doing of the things set out." The things

and means than set out are things which I believe the patentee, under its patent already had the right to do.

The Government argues that the instant case and the Bath Tub Case have one basic common theme, that is conspiracy, joint action, agreement to use the patent for the purpose of fixing prices among themselves. The difficulty is that the Government fails to set out any identifying facts to show that the Wayne Pump Company and its licensees did anything more than the law permitted them to do under the monopoly granted by the patent. How they took joint action or entered into joint agreements to use the Jauch patent to achieve the alleged illegal objectives, or how they went outside the monopoly granted to the patentee and its licensees, is nowhere set out in the indictments.

The indictments also allege, as another of the means used to accomplish the illegal objectives, that the defendant Wayne Pump Company, with the consent of G. & B. and Tokheim, approached gasoline pump manufacturers purchasing computing mechanisms from Neptune, and other gasoline pump manufacturers using computing mechanisms of their own make in the manufacture of computer pumps, and attempted to induce each of such manufacturers to accept a license under the Jauch patent; and that the Wayne Pump Company, with the authorization of G. & B. and Tokheim, would issue such license to each of such manufacturers on terms securing to the defendants control of all of the new licensee's patents on computing mechanisms and computer pumps and of the licensee's prices for the sale of computer pumps. Also that the defendant Wayne, with the consent of G. & B. and Tokheim, attempted to compel Neptune, the sole manufacturer and seller of computing mechanisms other than Veeder, to forever acknowledge the validity of the Jauch patent, to submit all patents on computer pumps and computing mechanisms owned or controlled by Neptune to uses determined by Wayne, and to refrain from manufacturing or selling computing mechanisms except to customers approved by Wayne, G. & B. and Tokheim.

Again it is not clear what is meant by the allegation that defendants attempted to compel Neptune to submit all patents owned or controlled by it on computer pumps "to uses determined by Wayne." With the issuing of the Jauch patent the Wayne Company dominated the computer pump field. In fact the indictments allege that the public demanded the new invention and that nineteen gasoline pump manufacturers ceased to do business because they did not have licenses to manufacture the computer pump. The entire world, other than the Wayne Company, was excluded for seventeen years from making, using, or selling com-

puter pumps, or any combination machine or unit which embodied the five elements described by Judge Slick in the case of Wayne Company v. Anchor Oil Company, 20 Fed. Supp. 745, as follows:

"(1) A source of liquid supply. (2) A pump; the suction side of which is connected to said source of liquid supply. (3) A meter. (4) A registering means operated by said meter for registering the liquid dispensed and the cost thereof. (5) Means for changing the relation between the cost operating portion whereby the unit cost per unit amount dispensed may be varied."

53 Judge Slick held the Jauch patent valid, and that the

Neptune Company (manufacturer of computing mechanisms which were ultimately sold to the Anchor Company) was an infringer of the Wayne patent. The Neptune Company and the Anchor Oil Company were thereafter precluded from manufacturing, selling or using computer mechanisms for computer pumps, and all gasoline pump manufacturers who purchased computing mechanisms from them and used the same in the manufacture of computer pumps would also be infringers. Under these conditions I fail to see how defendants aided in carrying out an unlawful conspiracy because defendant Wayne Company, with the consent of G. & B. and Tokheim, approached gasoline pump manufacturers, who had purchased computer mechanisms from Neptune and other manufacturers, and attempted to induce them to accept licenses under the Jauch patent. If in attempting to induce these manufacturers to accept such licenses, the Wayne Company, or any other of the defendants, made use of unlawful means, then those facts should be set out in the indictments. The indictments complain that an indispensable element of every computer pump is the computing mechanism, and without a source of supply of such mechanisms a manufacturer cannot make computer pumps. Under Judge Slick's decision, even with a supply of computer mechanisms no manufacturer can use them in the manufacture of computer pumps, save only as he is licensed by the Wayne Company to do so. Judge Slick held that the Jauch patent covered a meter and a registering means operated by said meter for registering the liquid dispensed and the cost thereof. It therefore follows that everyone making, using or selling this computer mechanism in connection with a computer pump would be an infringer.

The indictment also charges as one of the means or devices used in bringing about the combination or conspiracy that "the defendants Veeder, G. & B. and Tokheim acknowledge the validity of the Jauch patent." When G. & B. became licensees they were estopped from denying the validity of their licensor's patent,

and I see nothing illegal or unlawful in the licensor requiring of them that they acknowledge the validity thereof, especially, as here, where its validity had already been established by the United States District Court of Indiana. Agreements which provide that licensees recognize the validity of the patent beyond the termination of the license are valid agreements. *United Shoe Machinery Co. v. Caunt*, 134 Fed. 239; *Eskimo Pie Corp. v. National Ice Cream Co.*, 20 Fed. (2) 1003, 26 Fed. (2) 901. If any unlawful means were used in securing this acknowledgment, then the indictments should set them out clearly enough for defendants to meet these charges. Another means or device complained of in the indictments is that defendants determined jobbers resale prices for computer pumps, refused to sell computer pumps to any jobber failing or refusing to adhere to such resale prices, and that they eliminate discounts to all jobbers in the event of a general failure by jobbers to adhere to the said resale prices.

In a long line of decisions the United States Supreme Court has held that attempts to regulate future prices or future marketing of a patented article after complete sale by the owner thereof, were not valid exercises of the patent monopoly, and amounted to unlawful restraint of trade, invalid at common law, and, so far as interstate commerce was concerned, invalid under the Sherman Anti Trust Act of July 2, 1890. *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U. S. 373; *U. S. v. Schraders Sons*, 252 U. S. 85; *Boston Store v. American Graphophone Co.*, 246 U. S. 8; *Straus v. Victor Talking Machine Co.*, 243 U. S. 490.

54. The charge in the instant indictments is that "the said defendants determine jobbers' resale prices for computer pumps, refuse to sell computer pumps to any jobber failing or refusing to adhere to such resale prices, and eliminate discounts to all jobbers in the event of a general failure by jobbers to adhere to said resale prices." However, no facts are set out to show that the Wayne computer pumps were sold through jobbers, nor are the names of any specific jobbers given with whom these defendants carried on negotiations wherein the resale price of computer pumps was determined. In the case of *United States v. Colgate & Co.*, 253 Fed. 522, affirmed by the United States Supreme Court in 250 U. S. 300, defendant was indicted for conspiracy to fix the resale price at which wholesale and retail dealers might sell its product, the reference being to wholesalers and retailers generally, as is the reference in the instant indictments to jobbers generally. In the *Colgate* case the court said:

"It does not seem to the court that the alleged offense with which defendant is charged is stated, and set forth with that degree of accuracy and certainty required in criminal pleading.

The facts in no particular combination, against any one set of wholesalers or retailers alleged to have been in combination with the defendants, are given, but merely that assurances and promises were made by the wholesale and retail dealers, doing business with the defendant throughout the United States and the Eastern District of Virginia, that its products would not be resold at retail other than at prices fixed by the defendant. This language is too general, and the defendant has the right at least to be informed of some one particular infraction of the law that it is claimed it has committed. It would be impossible to intelligently prepare a defense or answer to this indictment, as it involves defendant's dealings with its wholesale and retail customers throughout the territory named, covering a period of three years. This is too indefinite, and there ought to be no difficulty, if such conditions exist, as set forth in the indictment, to name some specific instance of the alleged combination and state the same in detail."

So in the case at bar, if these conditions exist, the Government should have no difficulty in setting forth at least one specific instance of where defendants determined the resale price at which jobbers might resell computer pumps. If this condition does exist, surely the Government must be in possession of the facts, and they should be set out in the indictments, so as to reasonably inform defendants of the offense with which they are charged.

"Tying clauses" are also prohibited by Section 3 of the Clayton Act (U. S. C. A. Title 15, Sec. 14) but no facts are set out in the present indictments which charge defendants with the creation of a monopoly by means of "tying clauses."

The Government in its argument insists that competing patents are here involved, and that a monopoly of competing patents was acquired by some of the defendants in furtherance of the plan to carry out the conspiracy, but the indictments set out no facts whereby to identify these competing patents, nor in what manner nor by whom such monopoly in them was acquired. The Government also insists that not one but many patents on computer pumps, computing mechanisms and improvements thereon were used to achieve the illegal purpose or conspiracy, but again the indictments are silent as to the identity of the other patents side from the Jauch patent issued in November 1932. The indictments set out that changes in types of gasoline pumps have paralleled the major changes and improvements in the manufacture of automobiles; and that upon the advent of the computer pump it was so favored by the public that there was a marked shift from noncomputer pumps to the computer type, and that it thereupon became impossible

for any gasoline pump manufacturer to continue to engage in such business unless he manufactured computer pumps. The Jauch patent dominated the computer pump field, and gave to its owners the right to exclude therefrom all others. As the indictment points out, the computer pump was so favored by the public that there was a definite shift to this type of pump, and it thereupon became impossible for any manufacturer to continue to engage in such business unless he manufactured the computer type of pump. This is the very thing they could do only with the permission of the Wayne Company and upon its terms and conditions. As said before, upon the issuance of the Jauch patent by the United States Government, the owner thereof was granted an absolute monopoly on the manufacture and sale of computer pumps at any price it chose to fix for same. Over and above this complete monopoly, I fail to see how the owner of the patent and its licensees could engage in any further and unlawful monopoly, unless they went outside of the domain of the patent and were guilty of doing things which the law does not permit them to do, and no factual allegations are set out in the indictments to show that they did this. I have read the indictments in their entirety several times, and in the various means, acts and devices whereby the combinations and conspiracies are alleged to have been accomplished, I do not find that defendants are charged with the doing of anything which they did not already have the right, under the patent, to do. The fixing of prices and monopoly to manufacture and sell computer pumps, here complained of, were the very rights which the Wayne Company and its licensees enjoyed by reason of ownership of the patent. The courts have been unanimous in this construction of the rights of a patentee. If, in the interest of public policy, the monopoly which the patent laws confer upon an inventor seem too broad, redress must come from Congress, not from the courts.

It is fundamental that in every indictment the defendant is entitled to be informed with such definiteness and certainty of the accusations against him as will enable him to make his defense, and avail himself of acquittal or conviction in any further prosecution for the same offense. Having in mind that the subject matter of the instant indictments is protected by a patent, I am of the opinion that the defendants here have not been furnished with such definite and particular allegations of fact as will meet this test. The charges are much too general. They do not adequately describe the nature of the alleged unlawful conspiracy agreements or arrangements which defendants are accused of having made, nor show how the defendants became

parties thereto, nor how they collaborated in doing the unlawful things; nor set out any unlawful means whereby the unlawful objectives were accomplished.

Believing as I do, for the reasons heretofore stated, that the indictments are insufficient, the demurrers thereto will be sustained.

Enter.

February 17, 1942.

(Sgd.) PHILIP L. SULLIVAN,

Judge.

56 In the District Court of the United States, Northern
District of Illinois, Eastern Division

Present: The Honorable PHILIP L. SULLIVAN, Judge

No. 32597

UNITED STATES OF AMERICA

vs.

THE WAYNE PUMP COMPANY, ET AL.

Order sustaining demurrers

Feb. 24, 1942

This day again comes the United States by the United States Attorney come also the defendants in their own proper persons and by their attorneys and the Court having heretofore heard the arguments of counsel on the defendants' demurrers to the indictment filed herein against them and being now fully advised in the premises it is

Ordered that the demurrers to said indictment be and the same are hereby sustained.

57 In District Court of the United States

[Title omitted.]

Petition for appeal

Filed March 26, 1942

The United States of America, plaintiff herein, states that on the 24th day of February 1942, demurrers to the indictment herein, interposed by the defendants named therein, were sustained by this Court. The plaintiff, feeling aggrieved by the rulings of the Court in sustaining said demurrers, prays that it

be allowed to appeal to the Supreme Court of the United States for a reversal of said order and judgment, insofar as it sustains the demurrers to the indictment, and that a transcript of the record in this cause, duly authenticated, be sent to the Supreme Court of the United States.

The petitioner presents to the Court herewith a statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in this cause.

(s) DANIEL B. BRITT,

Daniel B. Britt,

Special Assistant to the Attorney General.

(s) J. ALBERT WOLL,

J. Albert Woll,

United States Attorney.

Northern District of Illinois, Eastern Division.

85 In District Court of the United States

[Title omitted.]

Assignments of error

Filed March 26, 1942

The United States of America, having filed its petition for appeal herein, now states that as a result of the action taken by this Court in sustaining the several demurrers to the indictment in this cause there has intervened in said cause manifest error to the prejudice of the United States in the following respects:

1. The Court committed material error against the plaintiff in sustaining the several demurrers interposed to the indictment in the above entitled cause by the defendants named thereon:

2. The Court committed material error in sustaining such demurrers on the grounds and for the reasons as stated in the Opinion of the Court:

First, that the objective of the conspiracy as set out in the indictment is one which a patentee and those combining with him may lawfully entertain and use under the patent laws of the United States, and therefore does not constitute a violation of the Sherman Act.

Second, that the means set out for effectuating the objective charged in the indictment are means which a patentee and those combining with him may lawfully entertain and use under the patent laws of the United States, and therefore do not constitute violations of the Sherman Act.

86 Third, that the objective of the alleged conspiracy together with the means set out in the indictment for effect-

tuating such objective are aims and means which a patentee and those combining with him may lawfully entertain and use under the patent laws of the United States, and therefore do not constitute violations of the Sherman Act.

The United States of America therefore respectfully prays that the action taken by this Court in sustaining the said demurrers, and the ruling of the Court entering judgment in favor of the aforesaid defendants on said demurrers, be set aside and held for naught.

(S) DANIEL B. BRITT,
Daniel B. Britt,

Special Assistant to the Attorney General.

87 In District Court of the United States

[Title omitted.]

*Order allowing appeal to the Supreme Court
of the United States*

Filed March 26, 1942

This cause having come on this day before the Court on petition of the United States of America, praying for the allowance of an appeal to the Supreme Court of the United States for a reversal of the order and judgment herein sustaining demurrers to the indictment interposed by the defendants named therein, and requesting that a duly authenticated copy of the record of this cause be transmitted to the Clerk of the Supreme Court of the United States; the Court having heard and considered said motion, together with petitioner's statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in this cause, the same having been duly filed with the Clerk of this Court.

It is therefore ordered and adjudged, that the United States of America be and it is hereby allowed an appeal to the Supreme Court of the United States from the order and judgment of this Court sustaining the demurrers of the defendants to the indictment herein; that a duly authenticated copy of the record in this cause be transmitted to the Clerk of the Court, and that a citation be issued as provided by law.

It is further ordered, that the United States of America
88 be and it is hereby allowed a period of forty days from the date hereof within which to file and docket said appeal in the Supreme Court of the United States.

Dated at Chicago, Illinois, this 26th day of March 1942.

(S) PHILIP L. SULLIVAN,
United States District Judge.

46 UNITED STATES VS. THE WAYNE PUMP CO. ET AL.

92 [Citation in usual form, filed March 26, 1942, omitted in printing.]

93 In District Court of the United States

[Title omitted.]

Praeceptum for transcript of record

Filed March 26, 1942

To the CLERK, *United States District Court,*

Northern District of Illinois, Eastern Division:

The appellant hereby directs that, in preparing the transcript of the record in the above-entitled cause for its appeal to the Supreme Court of the United States, you include the following:

1. Docket entries and minute entries showing return of the indictment, filing of demurrers, and entry of order and judgment sustaining demurrers.

2. Indictment.

3. Demurrers.

4. Opinion.

5. Order and judgment sustaining demurrers.

6. Petition for appeal to the Supreme Court of the United States.

7. Statement of jurisdiction of the Supreme Court of the United States.

8. Assignments of error.

9. Order allowing appeal.

10. Proof of service on appellees of petition for appeal, order allowing appeal, assignments of error, and statement of jurisdiction.

diction.

94 11. Citation.

12. Praeceptum.

DANIEL B. BRITT,

Daniel B. Britt,

Special Assistant to the Attorney General.

J. ALBERT WOLL,

J. Albert Woll,

United States Attorney,

Northern District of Illinois, Eastern Division.

95 [Clerk's certificate to foregoing transcript omitted in printing.]

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In Supreme Court of the United States

Statement of points and designation of record to be printed

Filed May 8, 1942

I

United States of America, appellant, states that in its brief and oral argument on its appeal in the above-entitled cause it will rely upon the points stated in its assignment of errors therein.

II

The entire record in this cause as filed in this Court is necessary for consideration of the points stated by appellant, and the entire transcript of record as transmitted by the Clerk of the District Court should be printed by the Clerk of this Court.

CHARLES FAHY,
Solicitor General.

Service acknowledged May 4th, 1942.

ARTHUR S. LYTTON, HAROLD F. MCGUIRE & JAMES M. CARLISLE,
By PB

Counsel for appellees Veeder-Root, Inc.,

G. H. Anthony, and J. H. Chaplin.

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JAMES H. WINSTON,

JOHN C. SLADE,

GEORGE W. OTT,

*Attorneys for Gilbert & Barker Manufacturing Company
and S. C. Hope, Appellees.*

EDWD. R. JOHNSTON,

By: WM. M. G.

CHAS. L. BYRON,

HOWARD SOMERVELL,

*Attorneys for the Wayne Pump Company and
B. F. Geyer, Appellees.*

BALLARD MOORE, LOUIS F. NIEZER, HAROLD W. NORMAN,

*Attorneys for Tokheim Oil Tank and Pump Company,
Appellees.*

BARRY GILBERT,

*Attorney for Gasoline Pump Manufacturers Association
and G. Denny Moore, Appellees.*

[File endorsement omitted]

48 UNITED STATES VS. THE WAYNE PUMP CO. ET AL.

99 Supreme Court of the United States

Order postponing further consideration of question of jurisdiction

May 25, 1942

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of the jurisdiction of this Court in this case is postponed to the hearing on the merits.

Mr. Justice Jackson took no part in the consideration or decision of this question.

[Endorsement on cover:] File No. 46499. D. C. U. S., N. Illinois. Term No. 81. The United States of America, Appellant vs. The Wayne Pump Company, Gilbert and Barker Manufacturing Company, Tokheim Oil Tank and Pump Company, et al. Filed April 24, 1942. Term No. 81 O.T. 1942.

CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 82

THE UNITED STATES OF AMERICA, APPELLANT

VS.

**THE WAYNE PUMP COMPANY, GILBERT AND
BARKER MANUFACTURING COMPANY, TOKHEIM
OIL TANK AND PUMP COMPANY, ET AL.**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS**

FILED APRIL 24, 1942

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

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THE UNITED STATES OF AMERICA, APPELLANT

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THE WAYNE PUMP COMPANY, GILBERT AND
BARKER MANUFACTURING COMPANY, TOKHEIM
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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS

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1 [Caption omitted.]

2 In the United States District Court Northern
District of Illinois

THE UNITED STATES

vs.

THE WAYNE PUMP COMPANY, GILBERT AND BARKER MANUFACTURING COMPANY, TOKHEIM OIL TANK AND PUMP COMPANY, VEEDER-ROOT INCORPORATED, B. F. GEYER, S. C. HOPE, G. H. ANTHONY, J. H. CHAPLIN

For U. S.: J. Albert Woll.

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- Jan. 31—Filed Indictment summons to issue for corporation and bench warrants for individual debts and bonds fixed at \$1,000 for individual debts. Woodward, J.
- Jan. 31—Issued (4) bench warrants and (4) summons.
- Feb. 4—Issued certified copy of indictment to Tokheim Oil Tank and Pump Co.
- Feb. 6—Filed Bond (Tokheim Oil Tank and Pump Co.) Surety Co.
- Feb. 6—Filed Bond (Wayne Pump Company) Surety Co.
- Feb. 6—Filed Bond (B. F. Geyer) Surety Co.
- Feb. 5—Order cause referred to executive committee for re-assignment to Judge Sullivan, he having an earlier case same parties. Woodward, J.
- Feb. 5—Order reassigning cause to calendar of Judge Sullivan, (draft) Woodward and Holly, Judges.
- Feb. 8—Issued certificate copy of Indictment to Atty. General Swanson.
- Feb. 10—Order Clerk to return to Charles L. Byron bond in above cause for Wayne Pump Co.
- Feb. 10—See 32597 for receipt.
- Feb. 12—Filed Bond (Chaplin) Surety Co.
- Feb. 12—Filed Bond (G. H. Anthony) Surety Co.
- Feb. 14—Filed Appearance—Gilbert & Barker Mfg. Co. and S. C. Hope—James H. Winston and John C. Slade, Attys.
- Feb. 12—Filed Appearance—Veeder-Root, Inc., G. H. Anthony and J. H. Chaplin—James M. Carlisle and Arthur S. Lytton, Attys.
- Feb. 20—Filed Bond (Stanley C. Hope) Surety Co.
- Feb. 24—Filed Appearance—Tokheim Oil Tank and Pump Company, Ballard Moore, Harold W. Norman and Louis F. Niezer, Attys.

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- Feb. 24—Order Clerk of U. S. Court to release Tokheim Oil Tank and Pump Co. a bond in amount of \$1,000 inadvertently filed by said Co. Sullivan, J.
- Feb. 27—On mo. of defts. Attys. cause contd. for pleas to March 31, 1941. Sullivan, J.
- Mar. 17—Filed (4) bench warrants ret'd. unex. (bonds given).
- Mar. 17—Filed (4) summons ret'd. unex.
- Mar. 29—Filed Demurrer of Tokheim Oil Tank And Pump Company, a Corp., by Ballard Moore, Louis F. Niezer, and Harold W. Norman, Attys.
- Mar. 31—Filed Joint and Several Demurrer of Defts. Gilbert & Barker Manufacturing Company, a Corp., and S. C. Hope by James H. Winston, John C. Slade, and George W. Ott, their Attys.
- Mar. 31—Filed Joint and Several Demurrer of The Wayne Pump Company and B. F. Geyer by Edward R. Johnston, Charles L. Byron, and Howard Somervill, their Attys.
- Mar. 31—Filed Appearance of Harold F. McGuire as additional counsel for Veeder-Root, Inc., G. H. Anthony, and J. H. Chaplin.
- Mar. 31—Filed Joint and Several Demurrer and Motion to Quash of Veeder-Root Incorporated, a Corp., G. H. Anthony and J. H. Chaplin by Harold F. McGuire, James M. Carlisle, and Arthur S. Lytton, their Attys.
- Mar. 31—Lv. given defts. to file Briefs in 30 days and Gov't to file Reply Brief 30 days thereafter. Sullivan, J.
- Apr. 30—Filed Brief in Support of Demurrers to Both Indictments (see 32597).
- Apr. 30—Filed Notice of Filing and Proof of Service (see 32597).
- May 29—Filed Stipulation (see 32597).
- May 29—Order extending def't's. time for filing reply briefs to and including June 14, 1941, as per stipulation. Sullivan, J.
- May 29—Filed Notice of Filing of Memorandum in Opposition to Demurrers and Their Supporting Briefs, Daniel D. Britt, Special Asst. to the Atty. General.
- June 14—Filed Reply Brief in Support of Demurrers to Both Indictments, etc. (see 32597).
- June 14—Filed Notice of Filing and Proof of Service of Reply Brief (see 32597).
- Dec. 15—Argmts. hrd. in part and contd. for further hrg. to Dec. 16, 1941. Sullivan, J.

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Dec. 16—Argmts. hrd. and contd. and taken under advisement.
Sullivan, J.

1942

Feb. 24—Defts.' demurrer to indictment sustained—Sullivan, J.

Feb. 24—Filed Opinion of Judge Sullivan (see file 32597).

Mar. 26—Filed Petition for Appeal—Daniel B. Britt, Special
Asst. to Atty. General.

Mar. 26—Order allowing appeal to U. S. Supreme Court, etc.,
draft. Sullivan, J.

Mar. 26—Filed Statement as to Jurisdiction, Assignments of
Error, Proof of Service and Citation and Praeceptum
Daniel D. Britt, Special Assistant to the Attorney
General.

Mar. 26—Filed Notice to Defendants of Provisions of Rule 12—
Daniel D. Britt, Special Asst. to the Atty. General.

Apr. 2—Issued certified copy of partial docket entries
to Thurman Arnold.

Apr. 10—Filed Notice—Attys. for Appellees.

Apr. 10—Filed Statement of Appellees as to the Jurisdiction
of the Supreme Court to Review Judgments of Dis-
trict Court entered Feb. 24, 1942, by Harold W.
Norman, Louis F. Niezer, and Ballard Moore,
Attys., for Tokheim Oil Tank and Pump Company,
Harold F. McGuire, James M. Carlisle, and Arthur
S. Lytton, Attys. for Veeder-Root, Incorporated,
G. H. Anthony and J. H. Chaplin and Barry Gil-
bert, Atty. for Gasoline Pump Manufacturers Asso-
ciation and G. Denny Moore.

6 In District Court of The United States for the Northern
District of Illinois, Eastern Division

DECEMBER 1940 TERM

No. 32598

UNITED STATES OF AMERICA

v.

THE WAYNE PUMP COMPANY, ET AL.

Indictment

(Filed Jan. 31, 1941)

UNITED STATES OF AMERICA,

Northern District of Illinois, Eastern Division, ss:

The Grand Jurors of the United States of America, being duly
impaneled, sworn, and charged in the District Court of the United

States of America, for the Eastern Division of the Northern District of Illinois, at the December 1940 Term of said Court, and inquiring within and for the said Division and District at the said Term of said Court, upon their oaths find and present as follows, to wit:

COUNT ONE—I. PERIOD OF TIME COVERED BY THE INDICTMENT

1. Each of the allegations hereinafter contained in this indictment shall be deemed to refer to a period of time beginning in the year 1932, the exact date being to the grand jurors unknown, and continuing thereafter up to and including the date of the presentation of this indictment unless otherwise expressly stated.

2. Each allegation hereinafter made in this indictment that an act has been done by any of the defendants herein, or any other person, shall be deemed to be an allegation that such act was performed within three years next preceding the date of this indictment unless otherwise expressly stated.

II. DEFINITIONS

3. The term "gasoline pump" as used in this indictment shall be deemed to refer to any pump designed for dispensing gasoline.

4. The term "computing mechanism" as used in this indictment shall be deemed to refer to any mechanical device, which may be used in connection with a gasoline pump, that simultaneously calculates and registers quantities and prices of gasoline dispensed by such pump. The term "computing mechanism" shall also be deemed to include any mechanical device which may be used for varying the operation of a price register in a computing mechanism to enable such register to indicate calculated prices corresponding with selective changes made in the unit price of the gasoline being dispensed.

5. The term "computer pump" as used in this indictment shall be deemed to refer to a gasoline pump embodying a computing mechanism.

6. The term "noncomputer pump" as used in this indictment shall be deemed to refer to any gasoline pump other than a computer pump.

7. The word "patent" as used in this indictment shall be deemed to refer to applications for letters patent, applications for reissues of letters patent, as well as to patents.

III. THE DEFENDANTS

8. The following corporations and persons are hereby indicted and made defendants herein:

a. The Wayne Pump Company, a Maryland corporation, having its principal place of business in Fort Wayne, Indiana. Said defendant is sometimes hereinafter referred to as "Wayne."

b. Gilbert and Barker Manufacturing Company, a Massachusetts corporation, having its principal place of business in West Springfield, Massachusetts. Said defendant is sometimes hereinafter referred to as "G & B."

8 c. Tokheim Oil Tank and Pump Company, an Indiana corporation, having its principal place of business in Fort Wayne, Indiana. Said defendant is sometimes hereinafter referred to as "Tokheim."

d. Veeder-Root, Incorporated, a Connecticut corporation, having its principal place of business in Hartford, Connecticut. Said defendant is sometimes hereinafter referred to as "Veeder."

e. B. F. Geyer, a resident of Fort Wayne, Indiana, who was Vice President of defendant Wayne from 1932 to 1937 and has been President of defendant Wayne since 1937. The defendant Geyer was also, from 1932 to 1937, President of Wayne Company, whose relationship with defendant Wayne is set forth hereinafter.

f. S. C. Hope, a resident of Springfield, Massachusetts. Said defendant has been President of defendant G & B during the period of time covered by this indictment.

g. G. H. Anthony, a resident of Hartford, Connecticut. Said defendant has been President of the defendant Veeder during the period of time covered by this indictment.

h. J. H. Chaplin, a resident of Hartford, Connecticut. Said defendant has been Vice President of the defendant Veeder during the period of time covered by this indictment.

9. Wherever, in this indictment, it is alleged that a corporate defendant did any act or thing, such allegation shall be deemed to mean that the individuals named herein as defendants and described as officers, agents, or employees of said corporate defendant, did authorize, order, perform, or ratify such act or thing.

IV. COCONSPIRATORS

10. The following individual is not indicted but is named as a coconspirator herein: C. M. Niezer, a resident of Fort Wayne, Indiana, who has been President of Tokheim during the period of time covered by this indictment.

9. During the period of time covered by this indictment the above named coconspirator has actively engaged in the management of the business of Tokheim and, on his own behalf and on behalf of Tokheim, has conferred with the defendants named herein and with other persons to the Grand Jurors un-

known and has participated in, done, or ordered to be done, in whole or in part, the activities constituting the offense hereinafter charged in this indictment.

V. RELATIONSHIPS OF DEFENDANT WAYNE WITH WAYNE COMPANY

11. From 1932 until 1937, the defendant Wayne owned the stock of Wayne Company, an Indiana corporation having its principal office in Fort Wayne, Indiana. During such period of time Wayne Company was engaged in manufacturing and selling gasoline pumps and acquired ownership or secured control of certain patents pertaining to computing mechanisms and computer pumps and entered into certain license agreements with reference to such patents. The President of defendant Wayne, during said period, was Vice President of Wayne Company, and the Vice President of defendant Wayne was President of Wayne Company. The defendant Wayne controlled the policies of Wayne Company during the aforesaid period of time and authorized, directed, and ratified the acts and things done by Wayne Company and its officers, agents, and employees during said period.

12. In 1937 the defendant Wayne took over the assets, including patents and licenses issued under such patents; of its operating subsidiary, Wayne Company, and since such time has been engaged directly in manufacturing and selling gasoline pumps. Wayne Company has not since 1937 been engaged in the manufacture or sale of gasoline pumps.

10. VI. THE NATURE OF THE TRADE AND COMMERCE INVOLVED

13. The use of gasoline pumps is essential to the proper supply of gasoline to the millions of passenger cars and trucks operating on the highways of the United States. Changes in types of gasoline pumps have paralleled the major changes and improvements in the manufacture of automobiles. The earliest type of gasoline pump pumped gasoline out of one container into another container which acted as a measuring device. Later a gasoline pump was developed to measure a designated quantity of gasoline with a single stroke of the pumping handle. During the middle part of the twenties the so-called visible type of pump appeared on the market. On the top of the visible pump rested a large graduated glass bowl. The required amount of gasoline was pumped into this bowl, usually by hand, and was then dispensed to the customer by permitting gravity to carry the gasoline from the bowl to the gasoline tank in the motor vehicle. During the latter part of the twenties a great advance in gasoline pump construction was made in the development of the so-called meter

pump. This pump operated either by hand or by electricity, contained in addition to the pump, a meter for measuring the quantity of gasoline. The quantity was then registered by means of pointers revolving around a clock type dial placed above the meter.

14. In 1933 the first computer pump was placed on the market and due to public demand, aided by an energetic marketing program, such pumps have since that date largely supplanted the noncomputer pump. The computer pump was greatly favored by the public because the customer was able to see at a glance both the price and the quantity of the gasoline he had purchased. The shift in public demand from noncomputer pumps to computer pumps has been so marked that for several years it has been all but impossible for any gasoline pump manufacturer to continue to engage in such business unless he manufactured computer pumps.

11 15. The shift in sales from noncomputer to computer pumps is shown by the following table:

Manufacturers' Sales of Gasoline Pumps

| Year | Computer pumps | All gasoline pumps including computer pumps | Proportionate value of computer pumps |
|------|---------------------------------------|---|---------------------------------------|
| | | | <i>Percent</i> |
| 1931 | None | \$14,397,681 | 0 |
| 1933 | Small production chiefly experimental | 7,420,262 | ? |
| 1935 | \$9,076,219 | 12,060,219 | 75 |
| 1937 | \$25,283,233 | 28,518,799 | 88 |
| 1939 | \$20,030,976 | 22,003,649 | 91 |

16. The magnitude of the industry is shown by the fact that there are approximately 1,300,000 gasoline pumps in use in the United States and approximately 100,00 gasoline pumps are sold in the United States each year by gasoline pump manufacturers.

17. Prior to 1932 and during the period of time covered by this indictment, numerous applications for letters patent have been filed in the United States Patent Office on computer pumps, computing mechanisms, and improvements on computer pumps and computing mechanisms, and the United States Patent Office has issued numerous patents on such subjects. On or about November 22, 1932, the United States Patent Office issued a patent, known as the "Jauch Patent," on a computer pump. The Jauch Patent was issued by the Patent Office to certain employees of the Wayne Company who immediately assigned the said Jauch Patent to the Wayne Company. Under said Jauch Patent and other patents issued as hereinafter described the defendant

Wayne has licensed certain other gasoline pump manufacturers to make, use, and sell computer pumps, as hereinafter alleged.

18. An indispensable element of every computer pump is the computing mechanism. Without a source of supply of such mechanisms a manufacturer cannot make computer pumps.

12 19. The defendant Wayne, both before and after the issuance of the Jauch Patent, entered into certain arrangements and understandings with defendant Veeder, as hereinafter alleged, whereby the manufacturing and other facilities and patents of the defendant Veeder were to be utilized in the development of a commercially feasible computing mechanism. The defendant Veeder developed such a mechanism and during the period of time covered by this indictment, has manufactured such mechanisms and has sold such mechanisms in interstate trade and commerce, for use in computer pumps, only to defendants Wayne, G&B, and Tokheim, and such other manufacturers of gasoline pumps as are permitted by Wayne, G&B, and Tokheim to purchase computing mechanisms from Veeder.

20. The defendant Veeder manufactures computing mechanisms in the State of Connecticut and sells and ships such mechanisms to gasoline pump manufacturers in the States of Indiana, Massachusetts, Pennsylvania, Texas, and other States of the United States where computer pumps are manufactured. Such gasoline pump manufacturers, including defendants Wayne, G&B, and Tokheim, sell and ship computer pumps from their plants to customers located in other States of the United States, including customers in the Eastern Division of the Northern District of the State of Illinois.

21. During the period of time covered by this indictment the Neptune Meter Company (sometimes hereinafter referred to as "Neptune") manufactured computing mechanisms in the State of New York and sold and shipped such mechanisms to numerous manufacturers of gasoline pumps, other than defendants Wayne, G&B, and Tokheim, located in States other than New York, who used such computing mechanisms in the manufacture of computer pumps which were sold and shipped by such manufacturers to customers located in States other than where the computer pumps were manufactured. Such pumps were sold in competition with those manufactured by the defendant Wayne and its licensees including G&B and Tokheim.

13 22. During the same period of time other gasoline pump manufacturers produced computing mechanisms which were used in computer pumps of their own make which were sold and shipped to customers located in States other than where the pumps were manufactured, in competition with the computer pumps manufactured by the defendant Wayne and its licensees,

including G&B and Tokheim, and in competition with the computer pumps manufactured by companies purchasing computing mechanisms from Neptune.

23. Since the year 1938, however, the defendant Veeder has been the sole manufacturer in the United States of computing mechanisms used in computer pumps and the only available source of computing mechanisms used by manufacturers in the making of computer pumps.

24. The defendants Wayne, G&B, and Tokheim during the period of time covered by this indictment have been the three leading manufacturers of gasoline pumps in the United States. In 1939 such defendants manufactured and sold computer pumps constituting 56% of the value of all computer pumps sold in the United States, while Wayne, G&B, and Tokheim, with the eight other manufacturers licensed by Wayne, with the consent of G&B and Tokheim, to buy computing mechanisms from defendant Veeder and make computer pumps, manufactured and sold 100 per cent of the computer pumps made and sold in the United States. In the same year gasoline pumps of all types manufactured by Wayne and its licensees constituted approximately 99 per cent of the value of all gasoline pumps manufactured and sold in the United States. In 1931, prior to the introduction of computer pumps, there were approximately thirty manufacturers of gasoline pumps in the United States.

25. Most of the computer pumps manufactured by defendants Wayne, G&B, and Tokheim and other manufacturers are sold in interstate trade and commerce to major oil companies and to independent gasoline station operators for installation in gasoline filling stations throughout the United States.

14

VII. THE COMBINATION AND CONSPIRACY

26. The Grand Jurors aforesaid on their oaths aforesaid do further present that the defendants herein and other persons to the Grand Jurors unknown, well knowing all the facts alleged in this indictment, beginning in or about the year 1932, the exact date being to the Grand Jurors unknown, and continuously thereafter up to and including the date of the presentation of this indictment, knowingly have entered into and engaged in an unlawful combination and conspiracy to monopolize the manufacture and sale of computer pumps in the aforesaid interstate trade and commerce, which combination and conspiracy, in fact, has been and is now in violation of Section 2 of the Act of Congress of July 2, 1890, entitled "An Act To protect trade and commerce against unlawful restraints and monopolies" (U. S. C. A. Title 15, Section 2) commonly known as the Sherman Act; which

combination and conspiracy is now described in further detail, that is to say:

27. It is and has been a part of said combination and conspiracy that the defendants Wayne, G & B, and Tokheim use the Jauch patent owned by Wayne for the purpose of restricting the manufacture and sale of computer pumps to themselves; that the defendant Wayne license the defendants G & B and Tokheim under the Jauch patent to make, use and sell computer pumps; that the defendants Veeder, G & B, and Tokheim acknowledge the validity of the Jauch patent; that the defendant Wayne acquire, by purchase or otherwise, ownership or control of all patents on computing mechanisms and computer pumps capable of competing with computing mechanisms manufactured by Veeder or with computer pumps manufactured by Wayne, G & B, and Tokheim; that the defendant Veeder convey to Wayne ownership or control of all patents covering computing mechanisms and vital parts thereof developed by Veeder or its employees; that the defendant Veeder acquire, by purchase or otherwise, ownership or control of patents on computing mechanisms capable of competing with computing mechanisms manufactured by Veeder
15 or with computer pumps manufactured by Wayne, G & B, and Tokheim and convey ownership or control of such patents to Wayne; that the defendant Wayne determine the use of all patents on computing mechanisms and computer pumps and improvements thereon owned or controlled by either of the defendants G & B and Tokheim; that the defendant Wayne secure for itself and its gasoline pump manufacturer licensees special rights under patents on devices pertaining to the operation of computer pumps which are required by State Sealers or Fire Underwriters; that the defendant Wayne cause owners of all patents which the United States Patent Office declares to be in interference with the Jauch patent, to file in said Patent Office concessions of priority to the Jauch patent; that the defendants Wayne, G & B, and Tokheim purchase computing mechanisms only from the defendant Veeder; that Veeder sell computing mechanisms for use in the manufacture of computer pumps only to Wayne, G & B, and Tokheim and other purchasers approved by Wayne, G & B, and Tokheim; that Wayne, G & B, and Tokheim refrain from using computing mechanisms to convert non-computer pumps into computer pumps; that the said defendants refuse to sell computing mechanisms for use in converting non-computer pumps into computer pumps; that the said defendants restrict and discourage the sale of noncomputer pumps and vigorously promote the sale of computer pumps; that the defendant Wayne license no others than G & B and Tokheim under the Jauch patent except with the consent of G & B and Tokheim and

upon terms authorized by G & B and Tokheim; that the defendant Wayne with the consent of the defendants G & B and Tokheim approach gasoline pump manufacturers purchasing computing mechanisms from Neptune and all gasoline pump manufacturers using computing mechanisms of their own make in the manufacture of computer pumps, induce each of such manufacturers to accept a license under the Jauch patent, and, with the authorization of G & B and Tokheim, issue such license to each of such

16 manufacturers on terms securing to the defendants Wayne, G & B, and Tokheim control of all of the new licensee's patents on computing mechanisms and computer pumps; that the defendant Wayne with the consent of G & B and Tokheim compel Neptune, the sole manufacturer and seller of computing mechanisms other than Veeder, to forever acknowledge the validity of the Jauch patent, to submit all patents on computer pumps and computing mechanisms owned or controlled by Neptune to uses determined by Wayne, to refrain from manufacturing computing mechanisms except with the approval of Wayne, and to refrain from selling computing mechanisms except to customers approved by Wayne, G & B, and Tokheim; that the defendants Wayne, G & B, and Tokheim share royalty payments secured from the aforesaid new licensees; that the defendants Wayne, G & B, and Tokheim share litigation expenses incurred in enforcing the terms of the aforesaid new licenses; that the defendant Wayne charge each of such new licensees with violations of its license, and, under threat of cancellation of the license and imposition of liquidated damages, demand that each of such licensees accept a substitute license, and issue such license to each of said licensees on terms securing to Wayne, G & B, and Tokheim control of the ownership and official personnel of the licensee and protecting the Jauch patent in perpetuity.

28. For the purpose of effectuating the aforesaid combination and conspiracy the defendants have regularly and continuously entered into those agreements and done those things which, as hereinbefore alleged, they have combined and conspired to do and more particularly have done, among others, the following acts and things:

The defendant Tokheim during 1934 gave its consent to the licensing by Wayne under the Jauch patent of gasoline pump manufacturers purchasing Neptune's computing mechanism and gasoline pump manufacturers using computing mechanisms of their own make in the manufacture of computer pumps. In giving such consent the Board of Directors of defendant Tokheim passed a resolution on or about November 10, 1934 stating "That

we consent to a licensing arrangement to other companies only under terms that will admit of price control”

This resolution was passed after C. M. Niezer, Chairman of the Board of Directors, had “Brought to the attention of the Board the rather delicate status of the Computer situation, with reference, particularly, to doubtful claims in the Wayne Company patent.” under which Tokheim was licensed.

The defendant Wayne, with the consent of G & B and Tokheim, on or about January 2, 1935, issued a license under the Jauch patent to John Wood Manufacturing Company, Inc., a gasoline pump manufacturer using computing mechanisms of its own make in the manufacture of computer pumps, which was substantially similar to other licenses issued at approximately the same time to gasoline pump manufacturers purchasing Neptune computing mechanisms, and contained the following terms and conditions, among others: that the licensee acknowledge the validity of the Jauch patent; that all patents on computing mechanisms and computer pumps and improvements thereon owned or controlled by the licensee be subject to uses determined by the defendant Wayne; that the licensee refrain from using computing mechanisms to convert noncomputer pumps into computer pumps and from selling computing mechanisms for such purpose; that the licensee purchase computing mechanisms only from Veeder unless an exception was allowed by Wayne; that Wayne have the right to enforce adherence to the aforesaid terms and conditions by imposing liquidated damages or by cancellation of the license or both and by withdrawing from the licensee permission to purchase computing mechanisms from Veeder; that the licensee make certain royalty payments to Wayne.

Prior to the grant of such license the United States Patent Office had declared a patent on computing mechanisms controlled by John Wood Manufacturing Company, Inc., to be in interference with the Jauch patent. Wayne, as a condition to the grant of a license to the John Wood Company, required such licensee to cause to be filed in the United States Patent Office a concession of priority to the Jauch patent, which concession was filed in said Office in January 1935.

In or about June 1935 the defendant Wayne, with the consent of G & B and Tokheim, offered Neptune a license under the terms of which Neptune would acknowledge the validity of the Jauch patent, refrain from selling computing mechanisms to other companies except with the permission of Wayne, G & B, and Tokheim, and would permit all patents on computing mechanisms and computer pumps and improvements thereon, then owned or controlled or thereafter owned or controlled by Neptune, to be subject to uses determined by the defendant Wayne. Neptune

refused such license. Wayne in or about June 1935 offered to sell the Jauch and other patents on computing mechanisms and computer pumps owned or controlled by Wayne to Neptune on condition that Neptune would thereafter administer the licenses already issued under the Jauch patent on terms and conditions established by the defendant Wayne. Such offer was refused by Neptune. During 1935 the defendant Wayne, with the approval of G & B and Tokheim, instituted infringement proceedings against a user of a computer pump embodying a Neptune computing mechanism. Such suit was defended by Neptune. Wayne and Neptune during 1937 entered into a settlement of such suit, which settlement contained the following terms and conditions, among others: that Neptune acknowledge the validity of the Jauch patent in perpetuity; that all patents on computing mechanisms ~~except with the approval of Wayne; that Neptune~~ after acquired by Neptune be subject to uses determined by Wayne; that Neptune refrain from manufacturing computing mechanisms except with the approval of Wayne; that Neptune sell no computing mechanisms except to customers approved by Wayne, G & B, and Tokheim; that Neptune require a licensee of Wayne whose stock was controlled by Neptune to accept a substitute license under the terms of which said licensee would acknowledge the validity of the Jauch patent in perpetuity, 19 and would permit Wayne to cancel said license in the event of specified changes in the ownership of said licensee. The substitute license agreement required of such licensee was executed during 1937. Since the execution of the aforesaid agreement between Wayne and Neptune the defendant Wayne has refused to license other gasoline pump manufacturers under the Jauch patent and the defendant Veeder has refused to supply computing mechanisms to any gasoline pump manufacturer except Wayne, G & B Tokheim, and Wayne's other licensees.

During 1938 Wayne conducted an audit of the books of its licensees, threatened licensees other than G & B and Tokheim with the imposition of liquidated damages and with cancellation of their licenses for alleged violations thereof, and demanded that the licensees other than G & B and Tokheim enter into new license agreements. With the exception of Martin & Schwartz, Inc., such licensees other than G & B and Tokheim during 1938 entered into substantially similar substitute license agreements with defendant Wayne under the Jauch patent. These substituted licenses in addition to many of the clauses contained in the previous agreements contained clauses providing that the licensee acknowledge the validity of the Jauch patent in perpetuity and that the licensee grant to Wayne the right to cancel the license in the event of specified changes in the ownership or management of the licensee.

and computer pumps owned
or controlled and there-

During 1939 the defendant Wayne cancelled the license agreement of the smallest of its licensees and Veeder thereafter refused to sell computing mechanisms to such licensee without specific authorization from Wayne.

29. The combination and conspiracy hereinbefore described was intended to have and did have the following effects, among others: the defendants have prevented and controlled changes in the management and ownership of Wayne's gasoline pump manufacturer licensees other than defendants G & B and Tokheim;

20 have eliminated from the gasoline pump manufacturing field many manufacturers of gasoline pumps; have prevented the use of computing mechanisms to modernize non-computer pumps; have secured control of all manufacturing sources of computing mechanisms in the United States; have secured ownership or control of all patents pertaining to computing mechanisms and computer pumps; have restricted the manufacture of computing mechanisms to the defendant Veeder; have restricted the manufacture of computer pumps to the defendant Wayne and its gasoline pump manufacturer licensees; have restricted the purchase of computing mechanisms for use in manufacturing computer pumps to Wayne and its licensees; have prevented the institution and continuation of litigation threatening the validity of the Jauch patent; have suppressed competition in the development, acquisition, and use of inventions and patents relating to computing mechanisms and computer pumps; and have in these and other ways completely monopolized interstate trade and commerce in computer pumps.

VIII. JURISDICTION AND VENUE

30. The combination and conspiracy hereinbefore alleged has operated and has been carried out within the Eastern Division of the Northern District of Illinois. Among other acts committed in the Eastern Division of the Northern District of Illinois by the defendants herein pursuant to the combination and conspiracy herein alleged and in furtherance thereof, during the period of time covered by this indictment and within three years preceding the date of the return of this indictment, were the following:

The defendant Geyer on behalf of defendant Wayne in or about December 1938 participated in meetings and conferences held within the City of Chicago relative to the execution of new license agreements between Wayne and its licensee John Wood Manufacturing Company, Inc., and in furtherance of the hereinbefore alleged combination and conspiracy.

21 The defendant Geyer on behalf of defendant Wayne in or about July 1938 participated in meetings and conferences held within the City of Chicago relative to the execution of new license agreements between defendant Wayne and its licensee the Southwest Pump Company and in furtherance of the hereinbefore alleged combination and conspiracy.

Representatives of the defendant Wayne in or about November 1939 participated in meetings and conferences with the Neptune Meter Company relative to the imposition of liquidated damages upon said Company and attempted at said meetings and conferences to induce the Neptune Meter Company to enter into further license agreements in furtherance of the aforesaid combination and conspiracy.

The defendant Geyer on behalf of defendant Wayne in or about June 1938 participated in meetings and conferences held within the City of Chicago relative to the acquisition of special rights under patents for use in connection with the operation of computer pumps.

And so the Grand Jurors aforesaid, upon their oaths aforesaid, do present that the defendants named, at the time and place and in the manner aforesaid, unlawfully have engaged in a continuing combination and conspiracy to monopolize the trade and commerce in computer pumps among the several States of the United States contrary to the form of the statute of the United States in such case provided and against the peace and dignity of the United States of America.

COUNT TWO

31. The Grand Jurors aforesaid, inquiring as aforesaid, upon their oaths aforesaid, do hereby reaffirm, reallege, and incorporate herein by reference as if herein set forth in full, each of the allegations set forth in paragraphs 1 to 25, inclusive, of this indictment.

VII. THE COMBINATION AND CONSPIRACY

32. The Grand Jurors aforesaid on their oaths aforesaid do further present that the defendants herein and other persons to the Grand Jurors unknown, well knowing all the facts alleged in this indictment, beginning in or about the year 1932, the exact date being to the Grand Jurors unknown, and continuously thereafter up to and including the date of the presentation of this indictment, knowingly have entered into and engaged in an unlawful combination and conspiracy to monop-

olize the manufacture and sale of computing mechanisms in the aforesaid interstate trade and commerce, which combination and conspiracy, in fact, has been and is now in violation of Section 2 of the Act of Congress of July 2, 1890 entitled "An Act To protect trade and commerce against unlawful restraints and monopolies" (U. S. C. A. Title 35, Section 2) commonly known as the Sherman Act; which combination and conspiracy is now described in further detail, that is to say:

33. It is and has been a part of said combination and conspiracy that the defendants Wayne, G & B, and Tokheim use the Jauch patent owned by Wayne for the purpose of controlling the manufacture and the purchase of computing mechanisms for use in manufacturing computer pumps; that the defendant Wayne license the defendants G & B and Tokheim under the Jauch patent to make, use and sell computer pumps; that the defendants Veeder, G & B, and Tokheim acknowledge the validity of the Jauch patent; that the defendant Wayne acquire, by purchase or otherwise, ownership or control of all patents on computing mechanisms and computer pumps capable of competing with computing mechanisms manufactured by Veeder or with computer pumps manufactured by Wayne, G & B, and Tokheim; that the defendant Veeder convey to Wayne ownership or control of all patents covering computing mechanisms and vital parts thereof developed by Veeder or its employees; that the defendant Veeder acquire, by purchase or otherwise, ownership or control of patents on computing mechanisms capable of competing with computing mechanisms manufactured by Veeder or with computer pumps

23 manufactured by Wayne, G & B, and Tokheim and convey ownership or control of such patents to Wayne; that the defendant Wayne determine the use of all patents on computing mechanisms and computer pumps and improvements thereon owned or controlled by either of the defendants G & B and Tokheim; that the defendant Wayne cause owners of all patents which the United States Patent Office declares to be in interference with the Jauch patent, to file in said Patent Office concessions of priority to the Jauch patent; that the defendants Wayne, G & B, and Tokheim purchase computing mechanisms only from the defendant Veeder; that Veeder sell computing mechanisms for use in the manufacture of computer pumps only to Wayne, G & B, and Tokheim and other purchasers approved by Wayne, G & B, and Tokheim; that Wayne, G & B, and Tokheim refrain from using computing mechanisms to convert non-computer pumps into computer pumps; that the said defendants refuse to sell computing mechanisms for use in converting non-computer pumps into computer pumps; that the said defendant restrict and discourage the sale of noncomputer pumps and

vigorously promote the sale of computer pumps; that the defendant Wayne license no others than G & B and Tokheim under the Jauch patent except with the consent of G & B and Tokheim and upon terms authorized by G & B and Tokheim; that the defendant Wayne with the consent of the defendants G & B and Tokheim approach gasoline pump manufacturers purchasing computing mechanisms from Neptune and all gasoline pump manufacturers using computing mechanisms of their own make in the manufacture of computer pumps, induce each of such manufacturers to accept a license under the Jauch patent, and, with the authorization of G & B and Tokheim, issue such license to each of such manufacturers on terms securing to the defendants Wayne, G & B, and Tokheim control of all of the new licensee's patents on computing mechanisms and computer pumps; that the defendant Wayne with the consent of G & B and Tokheim compel Neptune, the sole manufacturer and seller of computing mechanisms other than Veeder, to forever acknowledge the

24 validity of the Jauch patent, to submit all patents on computer pumps and computing mechanisms owned or controlled by Neptune to uses determined by Wayne, to refrain from manufacturing computing mechanisms except with the approval of Wayne, and to refrain from selling computing mechanisms except to customers approved by Wayne, G & B, and Tokheim; that the defendants Wayne, G & B, and Tokheim share royalty payments secured from the aforesaid new licensees; that the defendants Wayne, G & B, and Tokheim share litigation expenses incurred in enforcing the terms of the aforesaid new licenses; that the defendant Wayne charge each of such new licensees with violations of its license, and, under threat of cancellation of the license and imposition of liquidated damages, demand that each of such licensees accept a substitute license, and issue such license to each of said licensees on terms securing to Wayne, G & B, and Tokheim control of the ownership and official personnel of the licensee and protecting the Jauch patent in perpetuity.

34. For the purpose of effectuating the aforesaid combination and conspiracy the defendants have regularly and continuously entered into those agreements and done those things which, as hereinbefore alleged, they have combined and conspired to do and more particularly have done, among others, the following acts and things:

The defendant Wayne, with the consent of G & B and Tokheim, on or about January 2, 1935 issued a license under the Jauch patent to John Wood Manufacturing Company, Inc., a gasoline pump manufacturer using computing mechanisms of its own make in the manufacture of computer pumps, which was substantially similar to other licenses issued at approximately the

same time to gasoline pump manufacturers purchasing Neptune computing mechanisms, and contained the following terms and conditions, among others: that the licensee acknowledge the validity of the Jauch patent; that all patents on computing mechanisms and computer pumps and improvements thereon
25 owned or controlled by the licensee be subject to uses determined by the defendant Wayne; that the licensee refrain from using computing mechanisms to convert noncomputer pumps into computer pumps and from selling computing mechanisms for such purpose; that the licensee purchase computing mechanisms only from Veeder unless an exception was allowed by Wayne; that Wayne have the right to enforce adherence to the aforesaid terms and conditions by imposing liquidated damages or by cancellation of the license or both and by withdrawing from the licensee permission to purchase computing mechanisms from Veeder; that the licensee make certain royalty payments to Wayne.

Prior to the grant of such license the United States Patent Office had declared a patent on computing mechanisms controlled by John Wood Manufacturing Company, Inc. to be in interference with the Jauch patent. Wayne, as a condition to the grant of a license to the John Wood Company, required such licensee to cause to be filed in the United States Patent Office a concession of priority to the Jauch patent, which concession was filed in said Office in January 1935.

In or about June 1935 the defendant Wayne, with the consent of G & B and Tokheim, offered Neptune a license under the terms of which Neptune would acknowledge the validity of the Jauch patent, refrain from selling computing mechanisms to other companies except with the permission of Wayne, G & B, and Tokheim, and would permit all patents on computing mechanisms and computer pumps and improvements thereon, then owned or controlled or thereafter owned or controlled by Neptune, to be subject to uses determined by the defendant Wayne. Neptune refused such license. Wayne in or about June 1935 offered to sell the Jauch and other patents on computing mechanisms and computer pumps owned or controlled by Wayne to Neptune on condition that Neptune would thereafter administer the licenses already issued under the Jauch patent on terms and conditions established by the defendant Wayne. Such offer was refused by Neptune. During 1935 the defendant Wayne,

with the approval of G & B and Tokheim, instituted in
26 fringement proceedings against a user of a computer pump embodying a Neptune computing mechanism. Such suit was defended by Neptune. Wayne and Neptune during 1937 entered into a settlement of such suit, which settlement contained the following terms and conditions, among others: that Neptune

acknowledge the validity of the Jauch patent in perpetuity; that all patents on computing mechanisms and computer pumps owned or controlled and thereafter acquired by Neptune be subject to uses determined by Wayne; that Neptune refrain from manufacturing computing mechanisms except with the approval of Wayne; that Neptune sell no computing mechanisms except to customers approved by Wayne, G & B, and Tokheim; that Neptune require a licensee of Wayne whose stock was controlled by Neptune to accept a substitute license under the terms of which said licensee would acknowledge the validity of the Jauch patent in perpetuity, and would permit Wayne to cancel said license in the event of specified changes in the ownership of said licensee. The substitute license agreement required of such licensee was executed during 1937. Since the execution of the aforesaid agreement between Wayne and Neptune the defendant Wayne has refused to license other gasoline pump manufacturers under the Jauch patent and the defendant Veeder has refused to supply computing mechanisms to any gasoline pump manufacturer except Wayne, G & B, Tokheim, and Wayne's other licensees.

During 1938 Wayne conducted an audit of the books of its licensees, threatened licensees other than G & B and Tokheim with the imposition of liquidated damages and with cancellation of their licenses for alleged violations thereof, and demanded that the licensees other than G & B and Tokheim enter into new license agreements. With the exception of Martin & Schwartz, Inc., such licensees other than G & B and Tokheim during 1938 entered into substantially similar substitute license agreements with defendant Wayne under the Jauch patent. These
27 substituted licenses in addition to many of the clauses contained in the previous agreements contained clauses providing that the licensee acknowledge the validity of the Jauch patent in perpetuity and that the licensee grant to Wayne the right to cancel the license in the event of specified changes in the ownership or management of the licensee.

During 1939 the defendant Wayne cancelled the license agreement of the smallest of its licensees and Veeder thereafter refused to sell computing mechanisms to such licensee without specific authorization from Wayne.

35. The combination and conspiracy hereinbefore described was intended to have and did have the following effects, among others: the defendants have secured control of all manufacturing sources of computing mechanisms in the United States; have secured ownership or control of all patents pertaining to computing mechanisms and computer pumps; have restricted the manufacture of computing mechanisms to the defendant Veeder;

have restricted the manufacture of computer pumps to the defendant Wayne and its gasoline pump manufacturer licensees; have restricted the purchase of computing mechanisms for use in manufacturing computer pumps to Wayne and its licensees; have prevented the use of computing mechanisms to modernize non-computer pumps; have prevented the institution and continuation of litigation threatening the validity of the Jauch patent; have suppressed competition in the development, acquisition, and use of inventions and patents relating to computing mechanisms and computer pumps; and have in these and other ways completely monopolized the interstate trade and commerce in computing mechanisms.

VIII. JURISDICTION AND VENUE

36. The combination and conspiracy hereinbefore alleged has operated and has been carried out within the Eastern Division of the Northern District of Illinois. Among other acts committed in the Eastern Division of the Northern District of Illinois by the defendants herein pursuant to the combination and conspiracy herein alleged and in furtherance thereof, during the period of time covered by this indictment and within three years preceding the date of the return of this indictment, were the following:

The defendant Geyer on behalf of defendant Wayne in or about December 1938 participated in meetings and conferences held within the City of Chicago relative to the execution of new license agreements between Wayne and its licensee John Wood Manufacturing Company, Inc. and in furtherance of the hereinbefore alleged combination and conspiracy.

The defendant Geyer on behalf of defendant Wayne in or about July 1938 participated in meetings and conferences held within the City of Chicago relative to the execution of new license agreements between defendant Wayne and its licensee the Southwest Pump Company and in furtherance of the hereinbefore alleged combination and conspiracy.

Representatives of the defendant Wayne in or about November 1939 participated in meetings and conferences with the Neptune Meter Company relative to the imposition of liquidated damages upon said Company and attempted at said meetings and conferences to induce the Neptune Meter Company to enter into further license agreements in furtherance of the aforesaid combination and conspiracy.

And so the Grand Jurors aforesaid, upon their oaths aforesaid, do present that the defendants named, at the time and place and in the manner aforesaid, unlawfully have engaged in a continuing combination and conspiracy to monopolize the trade and com-

merce in computing mechanisms among the several States of the United States contrary to the form of the statute of the United States in such case provided and against the peace and dignity of the United States of America.

29

(s) LEO F. TIERNEY,

Leo F. Tierney,

(s) DANIEL B. BRITT,

Daniel B. Britt,

*Special Assistants to
the Attorney General.*

(s) WILLIS L. HOTCHKISS,

Willis L. Hotchkiss,

(s) JAMES C. CRAMOND,

James C. Cramond,

Special Attorneys.

(s) THURMAN ARNOLD,

Thurman Arnold,

Assistant Attorney General

(s) PAUL D. PAGE, JR.,

Paul D. Page, Jr.,

*Special Assistant to
the Attorney General.*

(s) J. ALBERT WOLL,

J. Albert Woll,

United States Attorney.

30

Indictment. Violation of Section Two of the Act of July 2, 1890 (U. S. C. A. Title 15, Sec. 1). A true bill, R. W. Barron, Foreman. Filed in open court this 31st day of January A. D. 1941. Hoyt King, Clerk.

31

In District Court of the United States

Demurrer of defendant Tokheim Oil Tank and Pump Company, a corporation, to the Indictment and each count thereof

Filed March 29, 1941

Now comes the defendant Tokheim Oil Tank and Pump Company, a corporation, by Ballard Moore, Louis F. Niezer and Harold W. Norman, its attorneys, and demurs to the said indictment and each count thereof, and says that the said indictment and each count thereof and the matters therein contained in substance and in form as the same are therein alleged and set forth,

are not sufficient in law to require this defendant to plead to said indictment or to answer the same, and that said indictment is insufficient in law to sustain a judgment against this defendant, and for the grounds of said demurrer shows:

1. Said indictment and each count thereof, in violation of the rights guaranteed to said defendant by the Fifth and Sixth Amendments to the Constitution of the United States, fails to describe and particularize the offenses attempted to be charged therein with sufficient definiteness, certainty and specificity

32 to inform it of the nature and cause of the accusation, to enable it to prepare and make its defense thereto, and to enable it to plead an acquittal or a conviction thereunder in bar of any other proceedings against it based on the matters or things, or any of them, on which said indictment is based.

2. The averments of said indictment, and each count thereof, purporting to charge a combination and conspiracy to monopolize the manufacture and sale of computer pumps and a combination and conspiracy to monopolize the manufacture and sale of computing mechanisms are mere conclusions.

3. Said indictment fails to make averments sufficient to identify and describe the supposed combination and conspiracy in each count of said indictment alleged, in that it does not allege with particularity any of the following:

(a) The factual basis upon which the United States relies for its charge that said combinations and conspiracies exist or have existed;

(b) The manner of formation of the supposed combinations and conspiracies;

(c) The terms of the supposed combinations and conspiracies; or

(d) The manner in and by which it is claimed that said defendant became a party to the supposed combinations or conspiracies.

4. The averments in said indictment and each count
33 thereof with respect to the supposed combinations and conspiracies to monopolize, and the intended means for the accomplishment thereof, are so vague, indefinite, uncertain, and conclusory in character as to fail to apprise said defendant of the manner in which the prosecution claims that it has violated the law pertaining to combination or conspiracy to monopolize the manufacture and sale of computer pumps or the manufacture and sale of computing mechanisms.

Because certain defects are specified herein, it is not intended that any other defects, omissions, or imperfections are waived, and the same are hereby insisted upon with like effect as if the same were herein set forth and enumerated.

For all of which causes of demurrer existing, this defendant says that said alleged indictment and each count thereof is demurrable and is not sufficient in substance or in form for it to make plea unto.

Wherefore this defendant prays that this demurrer be sustained and that said indictment and each count thereof be dismissed as to this defendant, and that it go hence without day.

(Sgd.) BALLARD MOORE

Ballard Moore,

(Sgd.) LOUIS F. NIEZER

Louis F. Niezer,

(Sgd.) HAROLD W. NORMAN,

Harold W. Norman.

*Attorneys for Tokheim Oil Tank and Pump Company,
a Corporation, Defendant.*

34

In District Court of the United States

[Title omitted.]

Joint and several demurrer of Defendants Veeder-Root, Incorporated, a corporation, G. H. Anthony and J. H. Chaplin to the said indictment and each count thereof

Filed March 31, 1941

Now come Veeder-Root, Incorporated, a corporation, G. H. Anthony and J. H. Chaplin, defendants in the above-entitled cause, by Harold F. McGuire, James M. Carlisle, and Arthur S. Lytton, their attorneys, and jointly and severally demur to the said indictment and each count thereof and say that the said indictment and each count thereof and the matters therein contained, in substance and in form as the same are therein alleged and set forth, are not sufficient in law to require these defendants, or any of them, to plead to said indictment or to answer the same, and that said indictment is insufficient in law to sustain a judgment against said defendants, or any of them, and for grounds of said demurrer show:

1. Said indictment and each count thereof, in violation of the rights guaranteed to said defendants by the Fifth and Sixth Amendments to the Constitution of the United States, fails to describe and particularize the offenses attempted to be charged therein with sufficient definiteness, certainty and specificity to inform them of the nature and cause of the accusation, to enable them to prepare and make their defense thereto, and to enable them to plead an acquittal or a conviction thereunder in

bar of any other proceedings against them based on the matters or things, or any of them, on which said indictment is based.

2. The averments of said indictment, and each count thereof, purporting to charge a combination and conspiracy to monopolize the manufacture and sale of computer pumps and a combination and conspiracy to monopolize the manufacture and sale of computing mechanisms are mere conclusions.

3. Said indictment fails to make averments sufficient to identify and describe the supposed combination and conspiracy in each count of said indictment alleged in that it does not allege with particularity any of the following:

(a) The factual basis upon which the United States relies for its charge that said combinations and conspiracies exist or have existed;

(b) The manner of formation of the *supposed* combinations and conspiracies;

(c) The terms of the supposed combinations and conspiracies;
or

(d) The manner in and by which it is claimed that said defendants became parties to the supposed combinations or conspiracies.

4. The averments in said indictment and each count thereof with respect to the supposed combinations and conspiracies to monopolies, and the intended means for the accomplishment thereof, are so vague, indefinite, uncertain, and conclusory
36 in character as to fail to apprise said defendants of the manner in which the prosecution claims that they have violated the law pertaining to combination or conspiracy to monopolize the manufacture and sale of the computer pumps or the manufacture and sale of computing mechanisms.

Because certain defects are specified herein, it is not intended that any defects, omissions, or imperfections are waived, and the same are hereby insisted upon with like effect as if the same were herein set forth and enumerated.

For all of which causes of demurrer existing, these defendants jointly and severally say that said alleged indictment and each count thereof is demurrable and is not sufficient in substance or in form for them or either of them to make plea unto.

Wherefore these defendants jointly and severally pray that this demurrer be sustained and that said indictment and each count thereof be dismissed as to these defendants and that they and each of them go hence without day.

JAMES M. CARLISLE
HAROLD F. McGUIRE
ARTHUR S. LYTTON.

37

In District Court of the United States

[Title omitted.]

Joint and several demurrer of the defendants Gilbert & Barker Manufacturing Company, a corporation, and S. C. Hope—

Filed March 31, 1941

Now come the defendants Gilbert & Barker Manufacturing Company, a corporation, and S. C. Hope, by James H. Winston, John C. Slade, and George W. Ott, their attorneys, and say that said indictment and each count thereof and the matters therein contained, in substance and in form as the same are therein alleged and set forth, are insufficient in law to require these defendants, or either of them, to plead unto or to answer the same, and say that said indictment and each count thereof is insufficient in law to sustain a judgment against said defendants or either of them; and, without intending to waive any other substantial causes of demurrer by the enumeration of the following specific causes, further demur to said indictment and each count thereof upon the following grounds:

(1) The allegations in said indictment and each count thereof are so vague, indefinite, and uncertain as to fail to
38 apprise these defendants, or either of them, of the nature of the charges against them or in what manner they, or either of them, have violated the law pertaining to combination or conspiracy to monopolize trade or commerce between the several States, or to exhibit to them facts so that they, or either of them, may know the nature of the charges against them sufficiently to prepare their defense.

(2) The averments of said indictment and each count thereof purporting to charge a combination and conspiracy to monopolize trade are mere conclusions, and said indictment and each count thereof fails to state acts and things essential to inform these defendants as to the supposed combination and conspiracy under said Section 2 of the Sherman Act.

(3) The said indictment and each count thereof fails to make averments sufficient to identify the supposed combination and conspiracy in that it does not, nor does any count thereof, allege with particularity any of the following:

(a) The manner of formation of the supposed combination and conspiracy, or any factual basis for the Government's theory that a combination and conspiracy exists or has existed;

(b) The terms of the supposed combination and conspiracy;

or

(c) The occurrence, transaction, or other test whereby the defendants may determine the Government's theory as to the existence of any combination or conspiracy, or whereby to determine the Government's theory as to what were the acts or events that put these defendants into the supposed combination or conspiracy.

(4) The said indictment and each count thereof fails to aver ultimate facts as distinguished from mere conclusions of the pleader, sufficient to inform the Court as to the supposed conspiracy under Section 2 of the Sherman Act.

(5) Although said indictment and each count thereof charges as a mere conclusion that there was and is a combination and conspiracy, said indictment and each count thereof significantly fails to allege that the defendant Gilbert & Barker Manufacturing Company or the defendant S. C. Hope, as its officer, agreed with, or acted in concert with, any corporation or person whatsoever to do any of the things mentioned in said indictment or in any count thereof other than to the extent involved in the taking by Gilbert & Barker Manufacturing Company of a license under the Jauch Patent from said Wayne Pump Company.

(6) The said indictment and each count thereof denies to these defendants the rights guaranteed to them under the Fifth and Sixth Amendments to the Constitution of the United States, in that it fails to be an indictment returned by a Grand Jury which informs them of the nature and cause of the accusation.

10 For all of which causes of demurrer existing, these defendants jointly and severally say that said alleged indictment and each count thereof is demurrable and is not sufficient in law for them, or either of them, to make plea unto.

Wherefore, these defendants jointly and severally pray that this demurrer be sustained and that said indictment and each count thereof be dismissed as to these defendants, and that they, and each of them, go hence without day.

JAMES H. WINSTON,

JOHN C. SLADE,

GEORGE W. OTT.

*Attorneys for Gilbert & Barker Manufacturing Company,
a corporation, and S. C. Hope, Defendants.*

41 In District Court of the United States

[Title omitted.]

Joint and several demurrer of defendants the Wayne Pump Company, a corporation, and B. F. Geyer to the said indictment and each count thereof

Filed March 31, 1941

Now come The Wayne Pump Company, a corporation, and B. F. Geyer, defendants in the above entitled cause, by Edward R. Johnston, Charles L. Byron, and Howard Somervell, their attorneys, and jointly and severally demur to the said indictment and each count thereof and say that the said indictment and each count thereof and the matters therein contained, in substance and in form as the same are therein alleged and set forth, are not sufficient in law to require these defendants, or either of them, to plead to said indictment or to answer the same, and that said indictment is insufficient in law to sustain a judgment against said defendants, or either of them, and for grounds of said demurrer show:

1. Said indictment and each count thereof, in violation of the rights guaranteed to said defendants by the Fifth and Sixth Amendments to the Constitution of the United States, fails to describe and particularize the offenses attempted to be charged therein with sufficient definiteness, certainty and specificity to inform them of the nature and cause of the accusation, to enable them to prepare and make their defense thereto, and to enable them to plead an acquittal or a conviction thereunder in bar of any other proceedings against them based on the matters or things, or any of them, on which said indictment is based.

2. The averments of said indictment, and each count thereof, purporting to charge a combination and conspiracy to monopolize the manufacture and sale of computer pumps and a combination and conspiracy to monopolize the manufacture and sale of computing mechanisms are mere conclusions.

3. Said indictment fails to make averments sufficient to identify and describe the supposed combination and conspiracy in each count of said indictment alleged, in that it does not allege with particularity any of the following:

(a) The factual basis upon which the United States relies for its charge that said combinations and conspiracies exist or have existed;

(b) The manner of formation of the supposed combinations and conspiracies;

(c) The terms of the supposed combinations and conspiracies; or

(d) The manner in and by which it is claimed that said defendants became parties to the supposed combinations or conspiracies.

4. The averments in said indictment and each count thereof with respect to the supposed combinations and conspiracies to monopolize, and the intended means for the accomplishment thereof, are so vague, indefinite, uncertain, and conclusory
43 in character as to fail to apprise said defendants of the manner in which the prosecution claims that they have violated the law pertaining to combination or conspiracy to monopolize the manufacture and sale of computer pumps or the manufacture and sale of computing mechanisms.

Because certain defects are specified herein, it is not intended that any defects, omissions, or imperfections are waived, and the same are hereby insisted upon with like effect as if the same were herein set forth and enumerated.

For all of which causes of demurrer existing, these defendants jointly and severally say that said alleged indictment and each count thereof is demurrable and is not sufficient in substance or in form for them or either of them to make plea unto.

Wherefore these defendants jointly and severally pray that this demurrer be sustained and that said indictment and each count thereof be dismissed as to these defendants and that they and each of them go hence without day.

(Sgd.) EDWARD R. JOHNSTON,

(Sgd.) CHARLES L. BYRON,

(Sgd.) HOWARD SOMERVELL,

Attorneys for said Defendants.

44 In District Court of the United States for the
Northern District of Illinois, Eastern Division

Indictment No. 32597.

UNITED STATES OF AMERICA

vs.

THE WAYNE PUMP COMPANY, ET AL.

Indictment No. 32598

UNITED STATES OF AMERICA

vs.

THE WAYNE PUMP COMPANY, ET AL.

Opinion

Filed Feb. 24, 1942

The two above indictments were returned on January 31st, 1941.

Indictment No. 32597, known as the price-fixing indictment, names as defendants four corporations: The Wayne Pump Company, a Maryland corporation; Gilbert & Barker Manufacturing Company, a Massachusetts corporation; Tokheim Oil Tank & Pump Company, an Indiana corporation; and Veeder-Root, Inc., a Connecticut corporation; one unincorporated association, the Gasoline Pump Manufacturers Association, its membership being composed of gasoline pump manufacturers, including Wayne Pump Company, G. & B. and Tokheim; and five individuals, who are officers of the various corporations, and charges them with having entered into and engaged in a combination and conspiracy to fix, maintain and control the prices of gasoline computer pumps in interstate commerce, in violation of Section 1 of the Sherman Act (15 U. S. C. A. 1).

Indictment No. 32597, known as the monopoly indictment in count one charges the four corporations and four of the individuals named in indictment No. 32597 with having entered into and engaged in a combination and conspiracy to monopolize the manufacture and sale of computer pumps; and in count two with having entered into and engaged in a combination and conspiracy to monopolize the manufacture and sale of computer mechanisms in interstate commerce, in violation of Section 2 of the Sherman Act (15 U. S. C. A. 2).

The indictments cover a period of time beginning in 1932 and continuing to the time of the return of the indictments, and set out that the acts alleged in the indictments were performed within three years next preceding the date of the return of the indictments.

The following terms are used and defined in the indictments:

"Gasoline pump" shall be deemed to refer to any pump designed to dispense gasoline.

"Computing mechanism" shall be deemed to refer to any mechanical device which may be used in connection with a gasoline pump, that simultaneously calculates and registers quantities and prices of gasoline dispensed by such pumps. The term "computing mechanism" shall also be deemed to include any mechanical device which may be used for varying the operation of a price register in a computing mechanism to enable such register
45 to indicate calculated prices corresponding with selective changes made in the unit price of the gasoline being dispensed.

"Computer pump" shall be deemed to refer to a gasoline pump embodying a computing mechanism.

"Noncomputer pump" shall be deemed to refer to any gasoline pump other than a computer pump.

"Patent" shall be deemed to refer to applications for letters patent, applications for reissues of letters patent, as well as to patents.

The defendants, The Wayne Pump Company (hereinafter referred to as Wayne Pump Company), Gilbert & Barker Manufacturing Company, (hereinafter referred to as G. & B.), and Tokheim Oil Tank & Pump Company (hereinafter referred to as Tokheim), are engaged in the manufacture of computer pumps. Defendant Veeder-Root, Inc. (hereinafter referred to as Veeder), is engaged in the manufacture of computing mechanisms. Defendant Gasoline Pump Manufacturers Association (hereinafter referred to as The Association) is a trade association whose membership consists, according to the indictment, "for the most part of gasoline pump manufacturers." The individual defendants named in the indictments are officers of the four corporations, and one employee of The Association.

C. M. Niezer, a resident of Fort Wayne, Indiana, who has been president of Tokheim during the period of time covered by these indictments, is named as a coconspirator therein, but is not indicted. The indictments charge that during the period of time covered by them this coconspirator has been actively engaged in the management of Tokheim, and has conferred with the various defendants and with others, and has participated in the activities constituting the offenses charged in the indictments.

The indictments also charge that from 1932 to 1937 the Wayne Pump Company owned the stock of Wayne Company, an Indiana corporation, which was engaged in manufacturing and selling gasoline pumps, and acquired ownership and control of certain patents pertaining to computer pumps and computing mechanisms and entered into license agreements with reference to such patents. That the president of Wayne Pump Company during said period was vice president of the Wayne Company, and the Vice President of the Wayne Pump Company was president of the Wayne Company, and that Wayne Pump Company controlled the policies of the Wayne Company during that period. That in 1937 the Wayne Pump Company took over the assets, including the patents and licenses issued under them, and since that time has been directly engaged in manufacturing and selling gasoline pumps, and that the Wayne Company has ceased to manufacture or sell gasoline pumps.

46 Paragraphs 13 to 25, inclusive of the indictments describe the nature of the trade and commerce involved, and set out that:

"13. The use of gasoline pumps is essential to the proper supply of gasoline to the millions of passenger cars and trucks operating on the highways of the United States. Changes in types of gasoline pumps have paralleled the major changes and improvements in the manufacture of automobiles. The earliest type of gasoline pump pumped gasoline out of one container into another container which acted as a measuring device. Later a gasoline pump was developed to measure a designated quantity of gasoline with a single stroke of the pumping handle. During the middle part of the twenties the so-called visible type of pump appeared on the market. On the top of the visible pump rested a large graduated glass bowl. The required amount of gasoline was pumped into this bowl, usually by hand, and was then dispensed to the customer by permitting gravity to carry the gasoline from the bowl to the gasoline tank in the motor vehicle. During the latter part of the twenties a great advance in gasoline pump construction was made in the development of the so-called meter pumps. This pump, operated either by hand or by electricity, contained in addition to the pump, a meter for measuring the quantity of gasoline. The quantity was then registered by means of pointers revolving around a clock type dial placed above the meter.

"14. In 1933 the first computer pump was placed on the market and due to public demand, aided by an energetic marketing program, such pumps have since that date largely supplanted the noncomputer pump. The computer pump was greatly favored

by the public because the customer was able to see at a glance both the price and the quantity of the gasoline he had purchased. The shift in public demand for noncomputer pumps to computer pumps has been so marked that for several years it has been all but impossible for any gasoline pump manufacturer to continue to engage in such business unless he manufactured computer pumps."

A table is then given showing this shift in sales from non-computer to computer pumps, from 1931 to 1939.

"16. The magnitude of the industry is shown by the fact that there are approximately 1,300,000 gasoline pumps in use in the United States and approximately 100,000 gasoline pumps are sold in the United States each year, by gasoline pump manufacturers.

"17. Prior to 1932, and during the period of time covered by this indictment, numerous applications for letters patent have been filed in the United States Patent Office on computer pumps, computing mechanisms, and improvements on computer pumps and computing mechanisms, and the United States Patent Office has issued numerous patents on such subjects. On or about November 22, 1932, the United States Patent Office issued a patent known as the 'Jauch Patent' on a computer pump. The Jauch Patent was issued by the Patent Office to certain employees of the Wayne Pump Company who immediately assigned the said Jauch Patent to the Wayne Company. Under said Jauch

47 patent and other patents issued as hereinafter described the defendant Wayne has licensed certain other gasoline pump manufacturers to make, use, and sell computer pumps, as hereinafter alleged.

"18. An indispensable element of every computer pump is the computer mechanism. Without a source of supply of such mechanisms a manufacturer cannot make computer pumps.

"19. The defendant Wayne, both before and after the issuance of the Jauch patent, entered into certain arrangements and understandings with defendant Veeder, as hereinbefore alleged, whereby the manufacturing and other facilities and patents of the defendant Veeder were to be utilized in the development of a commercially feasible computing mechanism. The defendant Veeder developed such a mechanism and during the period of time covered by this indictment has manufactured such mechanisms and has sold such mechanisms in interstate trade and commerce, for use in computer pumps, only to defendants Wayne, G & B, and Tokheim, and such other manufacturers of gasoline pumps as are permitted by Wayne, G & B, and Tokheim to purchase computing mechanisms from Veeder.

"20. The defendant Veeder manufactures computing mechanisms in the State of Connecticut and sells and ships such mechanisms to gasoline pump manufacturers in the States of Indiana, Massachusetts, Pennsylvania, Texas, and other states of the United States where computer pumps are manufactured. Such gasoline pump manufacturers including defendants Wayne, G & B, and Tokheim, sell and ship computer pumps from their plants to customers located in other states of the United States, including customers in the Eastern Division of the Northern District of Illinois.

"21. During the period of time covered by this indictment the Neptune Meter Company (sometimes hereinafter referred to as 'Neptune') manufactured computing mechanisms in the State of New York and sold and shipped such mechanisms to numerous manufacturers of gasoline pumps, other than defendants Wayne, G & B, and Tokheim, located in states other than New York, who used such computing mechanisms in the manufacture of computing pumps which were sold and shipped by such manufacturers to customers located in states other than where the computer pumps were manufactured. Such pumps were sold in competition with those manufactured by the defendant Wayne and its licensees, including G & B and Tokheim.

"22. During the same period of time other gasoline pump manufacturers produced computing mechanisms which were used in computer pumps of their own make which were sold and shipped to customers located in states other than where the pumps were manufactured, in competition with the computer pumps manufactured by the defendant Wayne and its licensees, including G & B and Tokheim, and in competition with the computer pumps manufactured by companies purchasing computing mechanisms from Neptune.

48 "23. Since the year 1938, however, the defendant Veeder has been the sole manufacturer in the United States of computing mechanisms used in computer pumps and the only available source of computing mechanisms used by manufacturers in the making of computer pumps.

"24. The defendants Wayne, G & B, and Tokheim, during the period covered by this indictment, have been the three leading manufacturers of gasoline pumps in the United States. In 1939 such defendants manufactured and sold computer pumps constituting 56% of the value of all computer pumps sold in the United States, while Wayne, G & B, and Tokheim, with the other eight manufacturers licensed by Wayne, with the consent of G & B and Tokheim, to buy computing mechanisms from defendant Veeder and make computer pumps, manufactured and

sold 100 percent of the computer pumps made and sold in the United States. In the same year gasoline pumps of all types manufactured by Wayne and its licensees constituted approximately 99 percent of the value of all gasoline pumps manufactured and sold in the United States. In 1931, prior to the introduction of computer pumps, there were approximately thirty manufacturers of gasoline pumps in the United States.

"25. Most of the computer pumps manufactured by defendants Wayne, G & B, and Tokheim and other manufacturers are sold in interstate trade and commerce to major oil companies and to independent gasoline station operators for installation in gasoline filling stations throughout the United States."

The indictments set out the combination and conspiracy, first in the price-fixing indictment, charging that all of the defendants—

"* * * well knowing all of the facts alleged in this indictment, beginning in or about the year 1932 * * * and continuously thereafter up to and including the date of the presentation of this indictment knowingly have entered into and engaged in a combination and conspiracy to fix, maintain, and control arbitrary, artificial and noncompetitive prices for the sale of computer pumps in the aforesaid interstate trade and commerce, which combination and conspiracy, in fact, has been and is now in restraint of trade and commerce in violation of Section 1 of the Act of Congress of July 2, 1890 * * * commonly known as the Sherman Act; which combination and conspiracy is now described in further detail, that is to say":

Thirty separate acts or means are then enumerated which are alleged to be "a part of said combination and conspiracy."

The indictment finally alleges that the defendants entered into the agreements and did the things they combined and conspired to do, and specifies in detail certain overt acts.

The monopoly indictment charges in count one that all of the defendants—

"* * * well knowing all of the facts alleged in this indictment, beginning in or about the year 1932 * * * and continuously thereafter up to and including the date of the presentation of this indictment, knowingly have entered into and engaged in an unlawful combination and conspiracy to monopolize the manufacture and sale of computer pumps in the aforesaid interstate trade and commerce, which combination and conspiracy in fact has been and is now in violation of Section 2 of the Act of Congress * * * commonly known as the Sherman Act, which combination and conspiracy is now described in further detail, that is to say:"

49 Twenty separate acts or means are then enumerated which are alleged to be "a part of said combination and conspiracy."

Count two charges that all of the defendants "knowingly have entered into and engaged in an unlawful combination and conspiracy to monopolize the manufacture and sale of computing mechanisms" in violation of Section 2 of the Sherman Act. Nineteen separate acts or means are enumerated which are alleged to be "a part of said combination and conspiracy."

Demurrers, supported by briefs, have been filed on behalf of all of the defendants, and answering briefs have been filed on behalf of the Government.

The demurrers challenge the sufficiency of the indictments on the ground that they fail to describe the alleged conspiracies and combinations with which defendants are charged so as to inform them of the nature and cause of the accusations against them and enable them to properly prepare their defenses.

The cases are before me now for disposition on these demurrers.

50 SULLIVAN, District Judge, after stating the facts as above:

Two indictments have been returned against these defendants. In indictment No. 32597 they are charged with combining and conspiring "to fix, maintain and control arbitrary, artificial and noncompetitive prices for the sale of computer pumps" in interstate commerce in violation of Section 1 of the Sherman Act. In indictment No. 32598 defendants are charged with combining and conspiring to monopolize the manufacture and sale of computing mechanisms in interstate commerce, in violation of Section 2 of the Sherman Act. Defendants Wayne Pump Company, G & B, and Tokheim are manufacturers of computer pumps, and defendant Vaeder is a manufacturer of computing mechanisms. Computer pumps and computer mechanisms, the subject matter of both the price fixing and the monopoly indictments, are covered by patents issued by the United States.

The indictments set out that the development of gasoline pumps has paralleled the major changes and improvements in the manufacture of automobiles; that from a rather crude beginning the type of gasoline pump in general was improved from time to time; that prior to 1932, however, a pump had not been developed which would automatically calculate and register both the quantities and prices of the gasoline dispensed.

On November 22, 1932, the United States patent office issued to one Jauch, an employee of the Wayne Pump Company, a patent covering the computer pump, which was subsequently assigned to the Wayne Company. The indictments set out that

this patent revolutionized the gasoline pump business, and that as soon as computer pumps were placed on the market they superseded all other types of pump, so that by 1939 they represented over 90% in value of gasoline pumps manufactured and sold in this country. That the computer pump was greatly favored by the public because the customer was able to see at a glance both the price and quantity of the gasoline he had purchased, and that so great has been the shift in public demand from non-computer pumps to computer pumps that for several years it has been all but impossible for any gasoline pump manufacturer to continue in business unless he manufactured computer pumps.

Following the grant of the Jauch patent and the commercial development of the computer pump manufactured thereunder, it appears that the Wayne Pump Company granted licenses to G & B and Tokheim to make, use and sell computer pumps. The indictments set out that at a later period, when the computer pump became a success and the public demand for it became great, the Wayne Company granted licenses to eight other pump manufacturers. As owner of the patent the Wayne Company had the right to grant these licenses on its own terms and conditions, just as it had a right to completely exclude all others from making, using or selling computer pumps for the time prescribed in the statute, provided only that in so doing it did not violate any other law.

51. In the case of Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co., 154 Federal, 358, a patentee's rights were challenged under the Sherman Act. In sustaining the patentee's rights Judge Baker (C. C. A. 7th Circuit) said:

"Under its constitutional right to legislate for the promotion of the useful arts, Congress passed the patent statutes. The public policy thereby declared is this: Inventive minds may fail to produce many useful things that they would produce if stimulated by the promise of a substantial reward; what is produced is the property of the inventor; he and his heirs and assigns may hold it as a secret until the end of time; the public would be largely benefited by obtaining conveyances of these new properties; so the people, through their representatives, say to the inventor: 'Deed us your property, possession to be yielded at the end of 17 years, and in the meantime we will protect you absolutely in the right to exclude every one from making, using or vending the thing patented without your permission.' [Citing cases.] Congress put no limitation, excepting the time, upon the monopoly. Courts can create none without legislating. * * * Use of the invention cannot be had except on the inventor's terms. Without paying or doing whatever he exacts no one can be ex-

empted from his right to exclude. Whatever the terms, courts will enforce them, provided only that the licensee is not thereby required to violate some law outside of the patent law, like the doing of murder or arson."

In *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U. S. 405, the court said:

"The inventor is one who has discovered something of value. It is his absolute property. He may withhold a knowledge of it from the public, and he may insist upon all the advantages and benefits which the statute promises him who discloses to the public his invention.

"It (a review of prior cases) shows that whenever this court has had occasion to speak, it has decided that an inventor receives from a patent the right to exclude others from its use for the time prescribed in the statute. And for his exclusive enjoyment of it during that time the public faith is forever pledged."

In *Bement & Sons v. National Harrow Co.*, 186 U. S. 70, the owner of the patent granted a license to a manufacturer to manufacture harrows under the patent. The suit against the manufacturer was one to recover damages for a violation of licenses and to restrain further violations. Mr. Justice Peckham, in his opinion, rendered in 1902, said:

52 "But that statute (Sherman Anti-Trust Law) clearly does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and logical conditions imposed upon the assignee or licensee of a patent by the owner thereof restricting the terms upon which the article may be used, and the price to be demanded therefor. Such a construction of the Act, we have no doubt, was never contemplated by its framers.

"The owner of a patented article can, of course, charge such price as he may choose and the owner of a patent may assign it or sell the right to manufacture and sell the article patented upon the condition that the assignee shall charge a certain amount for such article."

In *United States v. General Electric Co.*, 272 U. S. 476, suit in equity was brought by the Government against the General Electric Company and the Westinghouse Electric Company to enjoin them from prosecuting a plan for the distribution and sale of patented electric lamps. The General Electric Company was the owner of patents on tungsten-filament-incandescent lamps, and in granting a license under its patents to the Westinghouse Company it fixed the price at which the Westinghouse Company could sell the patented lamps. After examining various cases on

the subject, including *Bement v. National Harrow Co.*, supra, the Supreme Court said that the authority of the *Bement* case "has not been shaken by the cases we have reviewed." In dismissing the Government's bill and sustaining the right of the patentee-licensee to fix prices and impose other conditions under which the licensee could make, use, and vend the patented article, the court said:

"The patentee may make and grant a license to another to make and use the patented articles, but withhold his right to sell them. The licensee in such a case acquires an interest in the articles made. But if he sells them he infringes the right of the patentee and may be held for damages and enjoined. If the patentee goes further, and licenses the selling of the article, may he limit the selling by limiting the method of sale and the price? We think he may do so, provided the conditions of sale are normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly. One of the valuable elements of the exclusive right of a patentee is to acquire profit by the price at which the article is sold. The higher the price, the greater the profit, unless it is prohibitory. When the patentee licenses another to make and vend, and retains the right to make and vend on his own account, the price at which his licensee will sell will necessarily affect the price at which he can sell his own patented goods. It would seem entirely reasonable that he should say to the licensee, 'Yes, you may make and sell the articles under my patent, but not so as to destroy the profit that I wish to obtain by making and selling them myself.'"

In *Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co.*, 154 Fed. 358, the Rubber Tire Wheel Company, owner of the Grant patent on rubber tire wheels, had granted a number of licenses under which it exacted royalties, fixed the price at which licensees could sell the patented products, and imposed other terms and conditions. Suit was brought by the licensor to collect

royalties from the licensee, and the defense was set up
53 that the license arrangement was unlawful under the Sherman Act. In reversing the lower court, the Circuit Court of Appeals for this Circuit held that the patentee-licensee had the right to fix prices on the patented article and to impose other conditions, and in sustaining the right of the licensor to recover its royalties, Judge Baker said:

"The only grant to the patentee was the right to exclude others, and to have and to hold for himself and his assigns a monopoly, not a right limited or conditioned according to the sentiment of judges, but an absolute monopoly constitutionally conferred by the sovereign lawmakers. Over and above an absolute monopoly created by law, how can there be a further and unlawful mo-

nopoly in the same thing. If plaintiff were the sole maker of Grant tires, how could plaintiff's control of prices and output injure the people, deprive them of something to which they have a right? Is a greater injury or deprivation inflicted, if plaintiff authorizes a combination or pool to do what plaintiff can do directly? To say yes means that substance is disregarded, that mere words confer upon the people some sort of right or interest counter to the monopoly, when by the terms of the bargain the people agreed to claim none until Grant's deed to them shall have matured."

The indictments here charge the defendants Wayne Pump Company, G & B, and Tokheim with "using the Jauch patent" for the purpose of fixing prices among themselves on the sales of computer pumps, and for the purpose of restricting the manufacture and sale of such pumps. There is no charge that defendants fixed the prices of gasoline pumps generally, or restricted their manufacture and sale. They are charged only with fixing the prices of computer pumps, a right which the Wayne Pump Company already had under the statutory monopoly granted by the Government when its patent was issued. What is meant by the phrase "used the Jauch patent" is not quite clear. If the defendants did more than enter into ordinary patent license agreements, under the terms of which the Wayne Pump Company, as owner of the patent, licensed the others to manufacture computer pumps, and fixed the prices at which the pumps should be sold; or if the Government claims that these defendants were involved in some offense under the Sherman Act other than the exercise of a patent monopoly, then such offense should be set out clearly in the indictments.

While ownership of the patent gives to the patentee a complete monopoly within the field of his patent, it of course does not give him any license to violate the provisions of the Sherman Act or of any other law. Under his monopoly he may not use his patent as a pretext for fixing prices on an unpatented article of commerce; nor fix the resale price on his patented article; nor make use of "typing clauses." In the case of *United States v. Standard Sanitary Manufacturing Co.*, 226 U. S. 20, the patent owner and its licensees entered into a scheme for fixing prices on a common article of commerce—unpatented bath tubs—and then by a pretended use of a process patent attempted to evade the Sherman Act. This is obviously not the instant case, and the indictments do not allege that there was any understanding or agreement among the defendants to use the patent to fix prices on any unpatented article. In fact there is no allegation that there was any understanding or agreement among the defendants at all, aside from the allegation that they "know-

54 ingly have entered into and engaged in a combination and conspiracy to fix and maintain noncompetitive prices and to monopolize the manufacture and sale of computer pumps and computing mechanisms, by the doing of the thing set out." The things and means then set out are things which I believe the patentee, under its patent already had the right to do.

The Government argues that the instant case and the Bath Tub Case have one basic common theme, that is conspiracy, joint action, agreement to use the patent for the purpose of fixing prices among themselves. The difficulty is that the Government fails to set out any identifying facts to show that the Wayne Pump Company and its licensees did anything more than the law permitted them to do under the monopoly granted by the patent. How they took joint action or entered into joint agreements to use the Jauch patent to achieve the alleged illegal objectives; or how they went outside the monopoly granted to the patentee and its licensees, is nowhere set out in the indictments.

The indictments also allege, as another of the means used to accomplish the illegal objectives, that the defendant Wayne Pump Company, with the consent of G.&B. and Tokheim, approached gasoline pump manufacturers purchasing computing mechanisms from Neptune, and other gasoline pump manufacturers using computing mechanisms of their own make in the manufacture of computer pumps, and attempted to induce each of such manufacturers to accept a license under the Jauch patent; and that the Wayne Pump Company, with the authorization of G.&B. and Tokheim, would issue such license to each of such manufacturers on terms securing to the defendants control of all of the new licensee's patents on computing mechanisms and computer pumps and of the licensee's prices for the sale of computer pumps. Also that the defendant Wayne, with the consent of G.&B. and Tokheim, attempted to compel Neptune, the sole manufacturer and seller of computing mechanisms other than Veeder, to forever acknowledge the validity of the Jauch patent, to submit all patents on computer pumps and computing mechanisms owned or controlled by Neptune to uses determined by Wayne, and to refrain from manufacturing or selling computing mechanisms except to customers approved by Wayne, G.&B. and Tokheim.

Again it is not clear what is meant by the allegation that defendants attempted to compel Neptune to submit all patents owned or controlled by it on computer pumps "to uses determined by Wayne." With the issuing of the Jauch patent the Wayne Company dominated the computer pump field. In fact the indictments allege that the public demanded the new invention and that nineteen gasoline pump manufacturers ceased to

do business because they did not have licenses to manufacture the computer pump. The entire world, other than the Wayne Company, was excluded for seventeen years from making, using, or selling computer pumps, or any combination machine or unit which embodied the five elements described by Judge Slick in the case of Wayne Company v. Anchor Oil Company, 20 Fed. Supp. 745, as follows:

"(1) A source of liquid supply. (2) A pump, the suction side of which is connected to said source of liquid supply. (3) A meter. (4) A registering means operated by said meter for registering the liquid dispensed and the cost thereof. (5) Means for changing the relation between the cost operating portion whereby the unit cost per unit amount dispensed may be varied."

55 Judge Slick held the Jauch patent valid, and that the Neptune Company (manufacturer of computing mechanisms which were ultimately sold to the Anchor Company) was an infringer of the Wayne patent. The Neptune Company and the Anchor Oil Company were thereafter precluded from manufacturing, selling, or using computer mechanisms for computer pumps, and all gasoline pump manufacturers who purchased computing mechanisms from them and used the same in the manufacture of computer pumps would also be infringers. Under these conditions I fail to see how defendants aided in carrying out an unlawful conspiracy because defendant Wayne Company, with the consent of G & B and Tokheim, approached gasoline pump manufacturers, who had purchased computer mechanisms from Neptune and other manufacturers, and attempted to induce them to accept licenses under the Jauch patent. If in attempting to induce these manufacturers to accept such licenses, the Wayne Company, or any other of the defendants, made use of unlawful means, then those facts should be set out in the indictments. The indictments complain that an indispensable element of every computer pump is the computing mechanism, and without a source of supply of such mechanisms a manufacturer cannot make computer pumps. Under Judge Slick's decision, even with a supply of computer mechanisms no manufacturer can use them in the manufacture of computer pumps, save only as he is licensed by the Wayne Company to do so. Judge Slick held that the Jauch patent covered a meter and a registering means operated by said meter for registering the liquid dispensed and the cost thereof. It therefore follows that everyone making, using or selling this computer mechanism in connection with a computer pump would be an infringer.

The indictment also charges as one of the means or devices used in bringing about the combination or conspiracy that "the defendants Veeder, G. & B. and Tokheim acknowledge the valid-

ity of the Jauch patent." When G. & B. became licensees they were estopped from denying the validity of their licensor's patent, and I see nothing illegal or unlawful in the licensor requiring of them that they acknowledge the validity thereof, especially, as here, where its validity had already been established by the United States District Court of Indiana. Agreements which provide that licensees recognize the validity of the patent beyond the termination of the license are valid agreements. *United Shoe Machinery Co. v. Caunt*, 134 Fed. 239; *Eskimo Pie Corp. v. National Ice Cream Co.*, 20 Fed. (2) 1003, 26 Fed. (2) 201. If any unlawful means were used in securing this acknowledgment, then the indictments should set them out clearly enough for defendants to meet those charges. Another means or device complained of in the indictments is that defendants determined jobbers resale prices for computer pumps, refused to sell computer pumps to any jobber failing or refusing to adhere to such resale prices, and that they eliminate discounts to all jobbers in the event of a general failure by jobbers to adhere to the said resale prices.

In a long line of decisions the United States Supreme Court has held that attempts to regulate future prices of future marketing of a patented article after complete sale by the owner thereof, were not valid exercises of the patent monopoly and amounted to unlawful restraint of trade, invalid at common law, and, so far as interstate commerce was concerned, invalid under the Sherman Anti Trust Act of July 2, 1890. *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U. S. 373; *U. S. v. Schradars Sons*, 252 U. S. 85; *Boston Store v. American Graphophone Co.*, 246 U. S. 8; *Sraus v. Victor Talking Machine Co.*, 243 U. S. 490.

56 The charge in the instant indictments is that "the said defendants determine jobbers' resale prices for computer pumps, refuse to sell computer pumps to any jobber failing or refusing to adhere to such resale prices, and eliminate discounts to all jobbers in the event of a general failure by jobbers to adhere to said resale prices." However, no facts are set out to show that the Wayne computer pumps were sold through jobbers, nor are the names of any specific jobbers given with whom these defendants carried on negotiations wherein the resale price of computer pumps was determined. In the case of *United States v. Colgate & Co.*, 253 Fed. 522, affirmed by the United States Supreme Court in 250 U. S. 300, defendant was indicted for conspiracy to fix the resale price at which wholesale and retail dealers might sell its product, the reference being to wholesalers and retailers generally, as is the reference in the instant indictments to jobbers generally. In the *Colgate* case the court said:

"It does not seem to the court that the alleged offense with which defendant is charged is stated and set forth with that degree of accuracy and certainty required in criminal pleading. The facts in no particular combination, against any one set of wholesalers or retailers alleged to have been in combination with the defendants, are given, but merely that assurances and promises were made by the wholesale and retail dealers, doing business with the defendant throughout the United States and the Eastern District of Virginia, that its products would not be resold at retail other than at prices fixed by the defendant. This language is too general, and the defendant has the right at least to be informed of some one particular infraction of the law that it is claimed it has committed. It would be impossible to intelligently prepare a defense or answer to this indictment, as it involves defendant's dealings with its wholesale and retail customers throughout the territory named, covering a period of three years. This is too indefinite, and there ought to be no difficulty, if such conditions exist, as set forth in the indictment, to name some specific instance of the alleged combination and state the same in detail."

So in the case at bar, if these conditions exist, the Government should have no difficulty in setting forth at least one specific instance of where defendants determined the resale price at which jobbers might resell computer pumps. If this condition does exist, surely the Government must be in possession of the facts, and they should be set out in the indictment, so as to reasonably inform defendants of the offense with which they are charged.

"Tying clauses" are also prohibited by Section 3 of the Clayton Act (U. S. C. A. Title 15, Sec. 14) but no facts are set out in the present indictments which charge defendants with the creation of a monopoly by means of "tying clauses."

The Government in its argument insists that competing patents are here involved, and that a monopoly of competing patents was acquired by some of the defendants in furtherance of the plan to carry out the conspiracy, but the indictments set out no facts whereby to identify these competing patents, nor in what manner nor by whom such monopoly in them was acquired. The Government also insists that not one but many patents on computer pumps, computing mechanisms and improvements thereon were used to achieve the illegal purpose or conspiracy, but again the indictments are silent as to the identity of the other patents aside from the Jauch patent issued in November, 1932. The indictments set out that changes in types of gasoline pumps have paralleled the major changes and improvements in the manufacture of automobiles; and that upon the advent of the computer pump it was so favored by the public

that there was a marked shift from non-computer pumps to the computer type, and that it thereupon became impossible for any gasoline pump manufacturer to continue to engage in such business unless he manufactured computer pumps. The Jauch patent dominated the computer pump field, and gave to its owners the right to exclude therefrom all others. As the indictment points out, the computer pump was so favored by the public that there was a definite shift to this type of pump, and it thereupon became impossible for any manufacturer to continue to engage in such business unless he manufactured the computer type of pump. This is the very thing they could do only with the permission of the Wayne Company and upon its terms and conditions. As said before, upon the issuance of the Jauch patent by the United States Government, the owner thereof was granted an absolute monopoly on the manufacture and sale of computer pumps at any price it chose to fix for same. Over and above this complete monopoly, I fail to see how the owner of the patent and its licensees could engage in any further and unlawful monopoly, unless they went outside of the domain of the patent and were guilty of doing things which the law does not permit them to do, and no factual allegations are set out in the indictments to show that they did this. I have read the indictments in their entirety several times, and in the various means, acts and devices whereby the combinations and conspiracies are alleged to have been accomplished, I do not find that defendants are charged with the doing of anything which they did not already have the right, under the patent, to do. The fixing of prices and monopoly to manufacture and sell computer pumps, here complained of, were the very rights which the Wayne Company and its licensees enjoyed by reason of ownership of the patent. The courts have been unanimous in this construction of the rights of a patentee. If, in the interest of public policy, the monopoly which the patent laws confer upon an inventor seem too broad, redress must come from Congress not from the courts.

It is fundamental that in every indictment the defendant is entitled to be informed with such definiteness and certainty of the accusations against him as will enable him to make his defense, and avail himself of acquittal or conviction in any further prosecution for the same offense. Having in mind that the subject matter of the instant indictments is protected by a patent, I am of the opinion that the defendants here have not been furnished with such definite and particular allegations of fact as will meet this test. The charges are much too general. They do not adequately describe the nature of the alleged unlawful conspiracy agreements or arrangements which defendants are accused of

having made, nor show how the defendants became parties thereto, nor how they collaborated in doing the unlawful things; nor set out any unlawful means whereby the unlawful objectives were accomplished.

Believing as I do, for the reasons heretofore stated, that the indictments are insufficient, the demurrers thereto will be sustained.

Enter,

February 17th, 1942.

(Signed) PHILIP L. SULLIVAN,
Judge.

58 In District Court of the United States for the Northern
District of Illinois, Eastern Division

Present: The Honorable PHILIP L. SULLIVAN, Judge

No. 32598

UNITED STATES OF AMERICA

vs.

THE WAYNE PUMP COMPANY, ET AL.

Order sustaining demurrers

Feb. 24, 1942

This day again comes the United States by the United States Attorney come also the defendants in their own proper persons and by their attorneys and the Court having heretofore heard the arguments of counsel on the defendants' demurrers to the indictment filed herein against them and being now fully advised in the premises it is ordered that the demurrers to said indictment be and the same are hereby sustained.

59 In District Court of the United States

[Title omitted.]

Petition for appeal

Filed March 26, 1942

The United States of America, plaintiff herein, states that on the 24th day of February 1942, demurrers to the indictment

herein, interposed by the defendants named therein, were sustained by this Court. The plaintiff, feeling aggrieved by the rulings of the Court in sustaining said demurrers, prays that it be allowed to appeal to the Supreme Court of the United States for a reversal of said order and judgment, insofar as it sustains the demurrers to the indictment, and that a transcript of the record in this cause, duly authenticated, be sent to the Supreme Court of the United States.

The petitioner presents to the Court herewith a statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in this cause.

(S) DANIEL B. BRITT,
Daniel B. Britt,
Special Assistant to the Attorney General.

(S) J. ALBERT WOLL,
J. Albert Woll,
*United States Attorney,
Northern District of Illinois,
Eastern Division.*

87 In District Court of the United States

[Title omitted.]

Assignments of error.

Filed March 25, 1942

The United States of America, having filed its petition for appeal herein, now states that as a result of the action taken by this Court in sustaining the several demurrers to the indictment in this cause there has intervened in said cause manifest error to the prejudice of the United States in the following respects:

1. The Court committed material error against the plaintiff in sustaining the several demurrers interposed to the indictment in the above entitled cause by the defendants named thereon;

2. The Court committed material error in sustaining such demurrers on the grounds and for the reasons as stated in the Opinion of the Court:

First, that the objectives of the conspiracies as set out in the indictment are ones which a patentee and those combining with him may lawfully entertain and use under the patent laws of the

United States, and therefore does not constitute violations of the Sherman Act.

Second, that the means set out for effectuating the objectives charged in the indictment are means which a patentee and those combining with him may lawfully entertain and use under the patent laws of the United States, and therefore do not constitute violations of the Sherman Act.

88 Third, that the objectives of the alleged conspiracies together with the means set out in the indictment for effectuating such objectives are aims and means which a patentee and those combining with him may lawfully entertain and use under the patent laws of the United States, and therefore do not constitute violations of the Sherman Act.

The United States of America therefore respectfully prays that the action taken by this Court in sustaining the said demurrers, and the ruling of the Court entering judgment in favor of the aforesaid defendants on said demurrers, be set aside and held for naught.

(S) DANIEL B. BRITT,
Daniel B. Britt,

Special Assistant to the Attorney General.

89 In District Court of the United States

[Title omitted.]

Order allowing appeal to the Supreme Court of the United States

Filed March 25, 1942

This cause having come on this day before the Court on petition of the United States of America, praying for the allowance of an appeal to the Supreme Court of the United States for a reversal of the order and judgment herein sustaining demurrers to the indictment interposed by the defendants named therein, and requesting that a duly authenticated copy of the record of this cause be transmitted to the Clerk of the Supreme Court of the United States; the Court having heard and considered said motion, together with petitioner's statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in this cause, the same having been duly filed with the Clerk of this Court, it is therefore ordered and adjudged, that the United States of America be and it is hereby allowed an appeal to the

Supreme Court of the United States from the order and judgment of this Court sustaining the demurrers of the defendants to the indictment herein, that a duly authenticated copy of the record in this cause be transmitted to the Clerk of the Court, and that a citation be issued as provided by law.

It is further ordered, that the United States of America be and it is hereby allowed a period of forty days from the date hereof within which to file and docket said appeal in the Supreme Court of the United States.

Dated at Chicago, Illinois, this 25th day of March 1942.

(s) PHILIP L. SULLIVAN,
United States District Judge.

[Citation in usual form, filed March 26, 1942, omitted in printing.]

In District Court of the United States

Præcipe for transcript of record

Filed March 26, 1942

To The Clerk, *United States District Court,*
Northern District of Illinois, Eastern Division.

The appellant hereby directs that, in preparing the transcript of the record in the above-entitled cause for its appeal to the Supreme Court of the United States, you include the following:

1. Docket entries showing return of the indictment, filing of demurrers, and entry of order and judgment sustaining demurrers.

2. Indictment.

3. Demurrers.

4. Opinion.

5. Order and judgment sustaining demurrers.

6. Petition for appeal to the Supreme Court of the United States.

7. Statement of jurisdiction of the Supreme Court of the United States.

8. Assignments of error.

9. Order allowing appeal.

10. Proof of service on appellees of petition for appeal, order allowing appeal, assignments of error, and statement of jurisdiction.

96 11. Citation.

12. Praecipe.

DANIEL B. BRITT,

Daniel B. Britt,

Special Assistant to the Attorney General.

J. ALBERT WOLL,

J. Albert Woll,

United States Attorney,

Northern District of Illinois, Eastern Division.

97 [Clerk's certificate to foregoing transcript omitted in printing.]

99 In Supreme Court of the United States

Statement of points and designation of record to be printed

Filed May 8, 1942

I

United States of America, appellant, states that in its brief and oral argument on its appeal in the above-entitled cause it will rely upon the points stated in its assignment of errors therein.

II

The entire record in this cause as filed in this Court is necessary for consideration of the points stated by appellant, and the

entire transcript of record as transmitted by the Clerk of the District Court should be printed by the Clerk of this Court.

CHARLES FAHY,
Solicitor General.

Service acknowledged May 4, 1942.

ARTHUR S. LYTTON, HAROLD F. MCGUIRE, &
JAMES M. CARLISLE,
by PB

*Counsel for appellees Veeder-Root, Inc.,
G. H. Anthony, and J. H. Chaplin.*

100 JAMES H. WINSTON,
JOHN C. SLADE,
GEO. W. OTT.

*Attorneys for Gilbert & Barker Manufacturing Company and
S. C. Hope, Appellees.*

EDWD. R. JOHNSTON,
by W. M. G.

CHAS. L. BYRON,
HOWARD SOMERVELL.

*Attorneys for The Wayne Pump Company and
B. F. Geyer, Appellees.*

BALLARD MOORE, LOUIS J. NEIZEN, HAROLD W. NORMAN,
*Attorneys for Tokheim Oil Tank & Pump Company,
Appellees.*

[File endorsement omitted.]

101 Supreme Court of the United States

*Order postponing further consideration of question of
jurisdiction*

May 25, 1942

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of the jurisdiction of this Court in this case is postponed to the hearing on the merits.

Mr. Justice Jackson took no part in the consideration or decision of this question.

[Endorsement on cover:] File No. 46,500. D. C. U. S., N. Illinois. Term No. 82. The United States of America, Appellant vs. The Wayne Pump Company, Gilbert and Barker Manufacturing Company, Tokheim Oil Tank and Pump Company, et al. Filed April 24, 1942. Term No. 82 O. T. 1942.

FILE COPY
No. H71 81

In the Supreme Court of the United States

OCTOBER TERM, 1941

THE UNITED STATES OF AMERICA, APPELLANT

v.

THE WAYNE PUMP COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS

STATEMENT AS TO JURISDICTION

**In the District Court of the United States
for the Northern District of Illinois,
Eastern Division**

No. 32597 (Cr.)

UNITED STATES OF AMERICA

v.

THE WAYNE PUMP COMPANY ET AL.

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the United States of America submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the District Court entered in this cause on February 24, 1942. A petition for appeal was filed on March 26, 1942, and is presented to the District Court herewith, to wit, on the 26th day of March 1942.

JURISDICTION

The jurisdiction of the Supreme Court to review by direct appeal the judgment entered in this cause is conferred by the Act of March 2, 1907, 34 Stat. 1246, as amended (18 U. S. C. Sec. 682), commonly known as the Criminal Appeals Act, and by 28 U. S. C. Sec. 345.

The following decisions sustain the direct appellate jurisdiction of the Supreme Court to review the judgment in this cause on the ground that the judgment is based upon a construction of the statute on which the indictment is founded. *United States v. Patten*, 226 U. S. 525; *United States v. Carter*, 231 U. S. 492; *United States v. Colgate & Co.*, 250 U. S. 300; *United States v. Hastings*, 296 U. S. 188; *United States v. Borden Co.*, 308 U. S. 188; *United States v. Hutcheson*, 312 U. S. 219.

STATUTE INVOLVED

The statute of the United States, the construction of which is involved herein, is Section 1 of the Act of July 2, 1890, 26 Stat. 209, as amended (15 U. S. C. Sec. 1), commonly known as the Sherman Act, the pertinent provisions of which are as follows:

SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. * * *

Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

THE ISSUES AND THE RULING BELOW

The indictment in this case was returned on January 31, 1941. It charges The Wayne Pump Company (Wayne), Gilbert and Barker Manufacturing Company (G & B), Tokheim Oil Tank and Pump Company (Tokheim), all manufacturers of gasoline pumps, Veeder-Root, Incorporated (Veeder), a manufacturer of gasoline computing mechanisms, and Gasoline Pump Manufacturers Association, together with certain of their officers, with a continuing conspiracy from 1932 to the date of the indictment to fix the prices of computer pumps. Computer pumps are gasoline pumps embodying a computing mechanism which calculates and registers the quantities and prices of gasoline dispensed.

The allegations of the indictment may be summarized as follows:

In 1932 Wayne obtained a patent known as the Jauch patent on a computer pump. Wayne then entered into arrangements with Veeder for the latter to develop a commercially feasible computing mechanism, an indispensable element of every computer pump. Since 1938 Veeder has been the sole manufacturer of computing mechanisms for gasoline pumps.

Wayne, G & B, and Tokheim are the three leading manufacturers of gasoline pumps, selling 56 percent of all computer pumps sold in the United States, in 1939. In the same year these three com-

panies, together with eight other manufacturers licensed by Wayne, made all of the computer pumps sold in the United States, constituting 91 percent of the dollar volume of all gasoline pumps sold that year.

The indictment charges, *inter alia*, that it was a part of the conspiracy that Wayne, G & B, and Tokheim should use the Jauch patent to fix prices among themselves on their sales of computer pumps. It further charges that Wayne was to license G & B and Tokheim under the Jauch patent and was to acquire control of all patents on computer pumps and computing mechanisms competitive with pumps manufactured by Wayne, G & B, and Tokheim or with mechanisms manufactured by Veeder. Veeder, G & B, and Tokheim were to acknowledge the validity of the Jauch patent. Wayne, G & B, and Tokheim were to buy computing mechanisms only from Veeder; Veeder was to sell them only to Wayne, G & B, and Tokheim and those approved by them. Wayne, G & B, and Tokheim were to devise a formula for fixing prices and Wayne, on the basis of that formula, was to determine the minimum prices to which all three were to adhere. These defendants were also to determine jobbers' resale prices and were to refuse to sell computer pumps to any jobber who failed to adhere to such prices.

The indictment further alleges that Wayne was to grant no other licenses under the Jauch patent

except with the consent of G & B and Tokheim and upon terms authorized by them. Wayne was to induce computer pump manufacturers using mechanisms not made by Veeder to accept licenses under the Jauch patent on terms securing to Wayne, G & B, and Tokheim control of the licensees' patents, prices, and official personnel. Wayne was also to compel Neptune Meter Company, which, prior to 1938, engaged in the manufacture and sale of computer mechanisms and was Veeder's sole competitor in that business, to submit its patents to Wayne's control and to refrain from selling mechanisms except to customers approved by Wayne, G & B, and Tokheim. Gasoline Pump Manufacturers Association was to aid in enforcing adherence to the price-fixing scheme.

Demurrers to the indictment filed on behalf of all the defendants were sustained by the District Court. In its opinion the Court specifically referred to those allegations in the indictment charging that it was a part of the conspiracy (1) that the defendants use the Jauch patent for the purpose of fixing prices, (2) that they obtain control over all other patents on computer pumps and computing mechanisms and induce other manufacturers to accept licenses under the Jauch patent on terms that would give the defendants control over their prices, and (3) that the defendants Veeder, G & B, and Tokheim would acknowledge the validity of the Jauch patent. It held that these

allegations charged agreements which could lawfully be made under the monopoly of the Jauch patent. The other allegations, although not specifically mentioned by the Court, were disposed of by the following statement in the opinion:

I have read the indictments in their entirety several times, and in the various means, acts and devices whereby the combinations and conspiracies are alleged to have been accomplished, I do not find that defendants are charged with the doing of anything which they did not already have the right, under the patent, to do.

The court purported to base its decision upon various decisions of the Supreme Court and the lower federal courts dealing with the rights of a patentee and practices violative of the Sherman Act. It held that *United States v. Standard Sanitary Manufacturing Co.*, 226 U.S. 20, was inapplicable on the ground that there the patent owner and the licensees were using a process patent to fix prices on an unpatented article.

Although there are several statements in the opinion to the effect that certain allegations of the indictment are not clear or are indefinite and uncertain, and to the effect that if the Government charges that the defendants did something beyond the scope of the patent privilege it is not clearly set out in the indictments, a fair reading of the opinion in its entirety makes plain that the decision rests upon the ground that no violation of

the Sherman Act is alleged because the patent privilege exempts the acts charged from the prohibitions of that Act. It seems clear that the court, in stating that certain allegations were insufficient in form, meant that if those allegations were intended to charge anything beyond what the court found to be exempt from the Sherman Act by reason of the patent privilege, the allegations fail to do so in clear and certain terms. This interpretation of the opinion is supported by the fact that all of the decisions relied upon by the court to reach its conclusion relate to the scope of the Sherman Act and the patent law. We believe, therefore, that the decision cannot be said to be based upon the independent ground of indefiniteness, and accordingly that it is subject to review by this Court. *United States v. Borden Co.*, 308 U. S. 188; *United States v. Patten*, 226 U. S. 525; *United States v. Hastings*, 296 U. S. 188.

THE QUESTIONS ARE SUBSTANTIAL

The questions involved are substantial and of public importance. The effect of the decision of the District Court is to hold that a dominant group in an industry may combine and conspire to use a patent owned by one of the conspirators for the purpose of fixing the selling prices on the entire production of an important article of commerce. We believe that ruling to be contrary to the decision in *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20. In that case the manufac-

turers of a large percentage of all enameled iron-ware combined to use a patent held by one of the conspirators for the purpose of fixing the selling prices of all of them and the resale prices of their jobbers. This combination was held illegal under the Sherman Act. We think that there is no valid distinction between that case and the case at bar.

The District Court distinguished the *Standard Sanitary* case on the ground that it involved the use of a process patent to fix prices on an unpatented article. It is plain from the opinion of the Supreme Court that the distinction is without foundation. The Supreme Court, after holding that the combination was illegal, said (p. 49):

* * * this we say without entering into the consideration of the distinction of rights for which the Government contends between a patented article and a patented tool used in the manufacture of an unpatented article.

Furthermore, the indictment in this case should have been upheld upon the principle that a conspiracy entered into for the purpose of suppressing competition in an article is none the less illegal because one of the parties holds a patent on the article and could, acting alone and voluntarily, have lawfully imposed the same restraints on competition (*Interstate Circuit, Inc., v. United States*, 306 U. S. 208, 228-230), and that a combination between owners of different patents, formed

for the purpose of effecting a monopoly or fixing prices, is violative of the Sherman Act. . *National Harrow Co. v. Hench*, 83 Fed. 36 (C. C. A. 3); *Blount Mfg. Co. v. Yale & Towne Mfg. Co.*, 166 Fed. 555 (C. C. D. Mass.); see *Standard Oil Co. v. United States*, 283 U. S. 163, 174-175; *Straus v. American Publishers' Ass'n*, 231 U. S. 222.

The questions presented by this case are also involved in other cases now being prosecuted by the United States. An authoritative decision will be of great aid in the orderly administration of the antitrust laws.

Respectfully submitted.

(S) CHARLES FAHY,
Charles Fahy,
Solicitor General.

**In the District Court of the United States
for the Northern District of Illinois,
Eastern Division**

Indictment No. 32597

UNITED STATES OF AMERICA

v.

THE WAYNE PUMP COMPANY, ET AL.

Indictment No. 32598

UNITED STATES OF AMERICA

v.

THE WAYNE PUMP COMPANY, ET AL.

The two above indictments were returned on January 31st, 1941.

Indictment No. 32597, known as the price fixing indictment, names as defendants four corporations: The Wayne Pump Company, a Maryland corporation; Gilbert & Barker Manufacturing Company, a Massachusetts corporation; Tokheim Oil Tank & Pump Company, an Indiana corporation; and Veeder-Root, Inc., a Connecticut corporation; one unincorporated association, the Gasoline Pump Manufacturers Association, its membership being composed of gasoline pump manufacturers, including Wayne Pump Company, G. & B. and Tokheim; and five individuals, who are officers of the various corporations, and charges

them with having entered into and engaged in a combination and conspiracy to fix, maintain and control the prices of gasoline computer pumps in interstate commerce, in violation of Section 1 of the Sherman Act (15 U. S. C. A. 1).

Indictment No. 32597, known as the monopoly indictment in count one charges the four corporations and four of the individuals named in indictment No. 32597 with having entered into and engaged in a combination and conspiracy to monopolize the manufacture and sale of computer pumps; and in count two with having entered into and engaged in a combination and conspiracy to monopolize the manufacture and sale of computer mechanisms in interstate commerce, in violation of Section 2 of the Sherman Act (15 U. S. C. A. 2).

The indictments cover a period of time beginning in 1932 and continuing to the time of the return of the indictments, and set out that the acts alleged in the indictments were performed within three years next preceding the date of the return of the indictments.

The following terms are used and defined in the indictments:

"gasoline pump" shall be deemed to refer to any pump designed to dispense gasoline. "computing mechanism" shall be deemed to refer to any mechanical device which may be used in connection with a gasoline pump, that simultaneously calculates and registers quantities and prices of gasoline dispensed by such pumps. The term "computing mechanism" shall also be deemed to include any mechanical device which may be used for varying the operation of a price register in a computing mechanism to enable such

register to indicate calculated prices corresponding with selective changes made in the unit price of the gasoline being dispensed. "computer pump" shall be deemed to refer to a gasoline pump embodying a computing mechanism.

"non-computer pump" shall be deemed to refer to any gasoline pump other than a computer pump.

"patent" shall be deemed to refer to applications for letters patent, applications for reissues of letters patent, as well as to patents.

The defendants, The Wayne Pump Company (hereinafter referred to as Wayne Pump Company), Gilbert & Barker Manufacturing Company (hereinafter referred to as G. & B.), and Tokheim Oil Tank & Pump Company (hereinafter referred to as Tokheim), are engaged in the manufacture of computer pumps. Defendant Veeder-Root, Inc. (hereinafter referred to as Veeder) is engaged in the manufacture of computing mechanisms. Defendant Gasoline Pump Manufacturers Association (hereinafter referred to as The Association) is a trade association whose membership consists, according to the indictment, "for the most part of gasoline pump manufacturers." The individual defendants named in the indictments are officers of the four corporations, and one employee of The Association.

C. M. Niezer, a resident of Fort Wayne, Indiana, who has been president of Tokheim during the period of time covered by these indictments, is named as a co-conspirator therein, but is not indicted. The indictments charge that during the period of time covered by them this co-conspirator

has been actively engaged in the management of Tokheim, and has conferred with the various defendants and with others, and has participated in the activities constituting the offenses charged in the indictments.

The indictments also charged that from 1932 to 1937 the Wayne Pump Company owned the stock of Wayne Company, an Indiana corporation, which was engaged in manufacturing and selling gasoline pumps, and acquired ownership and control of certain patents pertaining to computer pumps and computing mechanisms and entered into license agreements with reference to such patents. That the president of Wayne Pump Company during said period was vice president of the Wayne Company, and the Vice President of the Wayne Pump Company was president of the Wayne Company, and that Wayne Pump Company controlled the policies of the Wayne Company during that period. That in 1937 the Wayne Pump Company took over the assets, including the patents and licenses issued under them, and since that time has been directly engaged in manufacturing and selling gasoline pumps, and that the Wayne Company has ceased to manufacture or sell gasoline pumps.

Paragraphs 13 to 25, inclusive, of the indictments describe the nature of the trade and commerce involved, and set out that:

13. The use of gasoline pumps is essential to the proper supply of gasoline to the millions of passenger cars and trucks operating on the highways of the United States. Changes in types of gasoline pumps have paralleled the major changes and improvements in the manufacture of automobiles.

The earliest type of gasoline pump pumped gasoline out of one container into another container which acted as a measuring device. Later a gasoline pump was developed to measure a designated quantity of gasoline with a single stroke of the pumping handle. During the middle part of the twenties the so-called visible type of pump appeared on the market. On the top of the visible pump rested a large graduated glass bowl. The required amount of gasoline was pumped into this bowl, usually by hand, and was then dispensed to the customer by permitting gravity to carry the gasoline from the bowl to the gasoline tank in the motor vehicle. During the latter part of the twenties a great advance in gasoline pump construction was made in the development of the so-called meter pumps. This pump, operated either by hand or by electricity, contained in addition to the pump, a meter for measuring the quantity of gasoline. The quantity was then registered by means of pointers revolving around a clock type dial placed above the meter.

14. In 1933 the first computer pump was placed on the market and due to public demand, aided by an energetic marketing program, such pumps have since that date largely supplanted the non-computer pump. The computer pump was greatly favored by the public because the customer was able to see at a glance both the price and the quantity of the gasoline he had purchased. The shift in public demand from non-computer pumps to computer pumps has been so marked that for several years it has been all but impossible for any gasoline pump manufacturer to continue to engage in such business unless he manufactured computer pumps.

A table is then given showing this shift in sales from non-computer to computer pumps, from 1931 to 1939.

16. The magnitude of the industry is shown by the fact that there are approximately 1,300,000 gasoline pumps in use in the United States and approximately 100,000 gasoline pumps are sold in the United States each year, by gasoline pump manufacturers.

17. Prior to 1932, and during the period of time covered by this indictment, numerous applications for letters patent have been filed in the United States Patent Office on computer pumps, computing mechanisms, and improvements on computer pumps and computing mechanisms, and the United States Patent Office has issued numerous patents on such subjects. On or about November 22, 1932, the United States Patent Office issued a patent known as the "Jauch Patent" on a computer pump. The Jauch Patent was issued by the Patent Office to certain employees of the Wayne Pump Company who immediately assigned the said Jauch Patent to the Wayne Company. Under said Jauch patent and other patents issued as hereinafter described, the defendant Wayne has licensed certain other gasoline pump manufacturers to make, use, and sell computer pumps, as hereinafter alleged.

18. An indispensable element of every computer pump is the computer mechanism. Without a source of supply of such mechanisms a manufacturer cannot make computer pumps.

19. The defendant Wayne, both before and after the issuance of the Jauch patent, entered into certain arrangements and un-

derstandings with defendant Veeder, as hereinbefore alleged, whereby the manufacturing and other facilities and patents of the defendant Veeder were to be utilized in the development of a commercially feasible computing mechanism. The defendant Veeder developed such a mechanism and during the period of time covered by this indictment has manufactured such mechanisms and has sold such mechanisms in interstate trade and commerce, for use in computer pumps, only to defendants Wayne, G & B, and Tokheim, and such other manufacturers of gasoline pumps as are permitted by Wayne, G & B, and Tokheim to purchase computing mechanisms from Veeder.

20. The defendant Veeder manufactures computing mechanisms in the State of Connecticut and sells and ships such mechanisms to gasoline pump manufacturers in the States of Indiana, Massachusetts, Pennsylvania, Texas, and other states of the United States where computer pumps are manufactured. Such gasoline pump manufacturers, including defendants Wayne, G & B, and Tokheim, sell and ship computer pumps from their plants to customers located in other States of the United States, including customers in the Eastern Division of the Northern District of Illinois.

21. During the period of time covered by this indictment the Neptune Meter Company (sometimes hereinafter referred to as "Neptune") manufactured computing mechanisms in the State of New York and sold and shipped such mechanisms to numerous manufacturers of gasoline pumps, other than defendants Wayne, G & B, and Tokheim, located in states other than New York, who used such computing mechanisms in the

manufacture of computing pumps which were sold and shipped by such manufacturers to customers located in states other than where the computer pumps were manufactured. Such pumps were sold in competition with those manufactured by the defendant Wayne and its licensees, including G & B and Tokheim.

22. During the same period of time other gasoline pump manufacturers produced computing mechanisms which were used in computer pumps of their own make which were sold and shipped to customers located in states other than where the pumps were manufactured, in competition with the computer pumps manufactured by the defendant Wayne and its licensees, including G & B and Tokheim, and in competition with the computer pumps manufactured by companies purchasing computing mechanisms from Neptune.

23. Since the year 1938, however, the defendant Veeder has been the sole manufacturer in the United States of computing mechanisms used in computer pumps and the only available source of computing mechanisms used by manufacturers in the making of computer pumps.

24. The defendants Wayne, G & B, and Tokheim, during the period covered by this indictment, have been the three leading manufacturers of gasoline pumps in the United States. In 1939 such defendants manufactured and sold computer pumps constituting 56% of the value of all computer pumps sold in the United States, while Wayne, G & B, and Tokheim, with the other eight manufacturers licensed by Wayne, with the consent of G & B and Tokheim, to

buy computing mechanisms from defendant Veeder and make computer pumps, manufactured and sold 100 per cent of the computer pumps made and sold in the United States. In the same year gasoline pumps of all types manufactured by Wayne and its licensees constituted approximately 99 per cent of the value of all gasoline pumps manufactured and sold in the United States. In 1931, prior to the introduction of computer pumps, there were approximately thirty manufacturers of gasoline pumps in the United States.

25. Most of the computer pumps manufactured by defendants Wayne, G & B, and Tokheim and other manufacturers are sold in interstate trade and commerce to major oil companies and to independent gasoline station operators for installation in gasoline filling stations throughout the United States.

The indictments set out the combination and conspiracy, first in the price-fixing indictment, charging that all of the defendants—

* * * well knowing all of the facts alleged in this indictment, beginning in or about the year 1932 * * * and continuously thereafter up to and including the date of the presentation of this indictment knowingly have entered into and engaged in a combination and conspiracy to fix, maintain and control arbitrary, artificial and non-competitive prices for the sale of computer pumps in the aforesaid interstate trade and commerce, which combination and conspiracy, in fact, has been and is now in restraint of trade and commerce in violation of Section 1 of the Act of Congress of July 2, 1890 * * * commonly known as

the Sherman Act; which combination and conspiracy is now described in further detail, that is to say:

Thirty separate acts or means are then enumerated which are alleged to be "a part of said combination and conspiracy."

The indictment finally alleges that the defendants entered into the agreements and did the things they combined and conspired to do, and specifies in detail certain overt acts.

The monopoly indictment charges in count one that all of the defendants—

* * * well knowing all of the facts alleged in this indictment, beginning in or about the year 1932 * * * and continuously thereafter up to and including the date of the presentation of this indictment, knowingly have entered into and engaged in an unlawful combination and conspiracy to monopolize the manufacture and sale of computer pumps in the aforesaid interstate trade and commerce, which combination and conspiracy in fact has been and is now in violation of Section 2 of the Act of Congress * * * commonly known as the Sherman Act, which combination and conspiracy is now described in further detail, that is to say:

Twenty separate acts or means are then enumerated which are alleged to be "a part of said combination and conspiracy."

Count two charges that all of the defendants "knowingly have entered into and engaged in an unlawful combination and conspiracy to monopolize the manufacture and sale of computing mechanisms" in violation of Section 2 of the Sher-

man Act: Nineteen separate acts or means are enumerated which are alleged to be "a part of said combination and conspiracy."

Demurrers, supported by briefs, have been filed on behalf of all of the defendants, and answering briefs have been filed on behalf of the Government.

The demurrers challenge the sufficiency of the indictments on the ground that they fail to describe the alleged conspiracies and combinations with which defendants are charged so as to inform them of the nature and cause of the accusations against them and enable them to properly prepare their defenses.

The cases are before me now for disposition on these demurrers.

SULLIVAN, District Judge, after stating the facts as above:

Two indictments have been returned against these defendants. In indictment No. 32597 they are charged with combining and conspiring "to fix, maintain and control arbitrary, artificial noncompetitive prices for the sale of computer pumps" in interstate commerce in violation of Section 1 of the Sherman Act. In indictment No. 32598 defendants are charged with combining and conspiring to monopolize the manufacture and sale of computing mechanisms in interstate commerce, in violation of Section 2 of the Sherman Act. Defendants Wayne Pump Company, G. & B. and Tokheim are manufacturers of computer pumps, and defendant Veeder is a manufacturer of computing mechanisms. Computer pumps and computer mechanisms, the subject matter of both the price fixing and the monopoly indictments, are covered by patents issued by the United States.

The indictments set out that the development of gasoline pumps has paralleled the major changes and improvements in the manufacture of automobiles; that from a rather crude beginning the type of gasoline pump in general was improved from time to time; that prior to 1932, however, a pump had not been developed which would automatically calculate and register both the quantities and prices of the gasoline dispensed.

On November 22, 1932, the United States patent office issued to one Jauch, an employee of the Wayne Pump Company, a patent covering the computer pump, which was subsequently assigned to the Wayne Company. The indictments set out that this patent revolutionized the gasoline pump business, and that as soon as computer pumps were placed on the market they superseded all other types of pump, so that by 1939 they represented over 90% in value of gasoline pumps manufactured and sold in this country. That the computer pump was greatly favored by the public because the customer was able to see at a glance both the price and quantity of the gasoline he had purchased, and that so great has been the shift in public demand from noncomputer pumps to computer pumps that for several years it has been all but impossible for any gasoline pump manufacturer to continue in business unless he manufactured computer pumps.

Following the grant of the Jauch patent and the commercial development of the computer pump manufactured thereunder, it appears that the Wayne Pump Company granted licenses to G & B and Tokheim to make, use and sell computer pumps. The indictments set out that at a later

period, when the computer pump became a success and the public demand for it became great, the Wayne Company granted licenses to eight other pump manufacturers. As owner of the patent the Wayne Company had the right to grant these licenses on its own terms and conditions, just as it had a right to completely exclude all others from making, using or selling computer pumps for the time prescribed in the statute, provided only that in so doing it did not violate any other law.

In the case of *Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co.*, 154 Federal, 358, a patentee's rights were challenged under the Sherman Act. In sustaining the patentee's rights Judge Baker (C. C. A. 7th Circuit) said:

Under its constitutional right to legislate for the promotion of the useful arts, Congress passed the patent statutes. The public policy thereby declared is this: Inventive minds may fail to produce many useful things that they would produce if stimulated by the promise of a substantial reward; what is produced is the property of the inventor; he and his heirs and assigns may hold it as a secret until the end of time; the public would be largely benefited by obtaining conveyances of these new properties; so the people, through their representatives, say to the inventor: "Deed us your property, possession to be yielded at the end of 17 years, and in the meantime we will protect you absolutely in the right to exclude every one from making, using or vending the thing patented without your permission." (Citing cases.) Congress put no limitation, excepting the time, upon the monopoly. Courts can create none without legislating. * * *

Use of the invention cannot be had except on the inventor's terms. Without paying or doing whatever he exacts no one can be exempted from his right to exclude. Whatever the terms, courts will enforce them, provided only that the licensee is not thereby required to violate some law outside of the patent law, like the doing of murder or arson.

In *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U. S. 405, the court said:

• The inventor is one who has discovered something of value. It is his absolute property. He may withhold a knowledge of it from the public, and he may insist upon all the advantages and benefits which the statute promises him who discloses to the public his invention.

• • • • • •

It (a review of prior cases) shows that whenever this court has had occasion to speak, it has decided that an inventor receives from a patent the right to exclude others from its use for the time prescribed in the statute. And for his exclusive enjoyment of it during that time the public faith is forever pledged.

In *Bement & Sons v. National Harrow Co.*, 186 U. S. 70, the owner of the patent granted a license to a manufacturer to manufacture harrows under the patent. The suit against the manufacturer was one to recover damages for a violation of licenses and to restrain further violations. Mr. Justice Peckham, in his opinion, rendered in 1902, said:

But that statute (Sherman Anti-Trust Law) clearly does not refer to that kind of a restraint of interstate commerce which

may arise from reasonable and logical conditions imposed upon the assignee or licensee of a patent by the owner thereof restricting the terms upon which the article may be used, and the price to be demanded therefor. Such a construction of the Act, we have no doubt, was never contemplated by its framers.

* * * * *

The owner of a patented article can, of course, charge such price as he may choose and the owner of a patent may assign it or sell the right to manufacture and sell the article patented upon the condition that the assignee shall charge a certain amount for such article.

In *United States v. General Electric Co.*, 272 U. S. 476, suit in equity was brought by the Government against the General Electric Company and the Westinghouse Electric Company to enjoin them from prosecuting a plan for the distribution and sale of patented electric lamps. The General Electric Company was the owner of patents on tungsten-filament-incandescent lamps, and in granting a license under its patents to the Westinghouse Company it fixed the price at which the Westinghouse Company could sell the patented lamps. After examining various cases on the subject, including *Bement v. National Harrow Co.*, *supra*, the Supreme Court said that the authority of the *Bement* case "has not been shaken by the cases we have reviewed." In dismissing the Government's bill and sustaining the right of the patentee-licensee to fix prices and impose other conditions under which the licensee could make, use, and vend the patented article, the court said:

The patentee may make and grant a license to another to make and use the patented articles; but withhold his right to sell them. The licensee in such a case acquires an interest in the articles made. But if he sells them he infringes the right of the patentee and may be held for damages and enjoined. If the patentee goes further, and licenses the selling of the article, may he limit the selling by limiting the method of sale and the price? We think he may do so, provided the conditions of sale are normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly. One of the valuable elements of the exclusive right of a patentee is to acquire profit by the price at which the article is sold. The higher the price the greater the profit, unless it is prohibitory. When the patentee licenses another to make and vend, and retains the right to make and vend on his own account, the price at which his licensee will sell will necessarily affect the price at which he can sell his own patented goods. It would seem entirely reasonable that he should say to the licensee, "Yes, you may make and sell the articles under my patent, but not so as to destroy the profit that I wish to obtain by making and selling them myself."

In *Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co.*, 154 Fed. 358, the Rubber Tire Wheel Company, owner of the Grant patent on rubber tire wheels, had granted a number of licenses under which it exacted royalties, fixed the price at which licensees could sell the patented product, and imposed other terms and conditions. Suit was brought by the licensor to collect royalties from

the licensee, and the defense was set up that the license arrangement was unlawful under the Sherman Act. In reversing the lower court, the Circuit Court of Appeals for this Circuit held that the patentee-licensee had the right to fix prices on the patented article and to impose other conditions, and in sustaining the right of the licensor to recover its royalties, Judge Baker said:

The only grant to the patentee was the right to exclude others, and to have and to hold for himself and his assigns a monopoly, not a right limited or conditioned according to the sentiment of judges, but an absolute monopoly constitutionally conferred by the sovereign lawmakers. Over and above an absolute monopoly created by law, how can there be a further and unlawful monopoly in the same thing? If plaintiff were the sole maker of Grant tires, how could plaintiff's control of prices and output injure the people, deprive them of something to which they have a right? Is a greater injury or deprivation inflicted, if plaintiff authorizes a combination or pool to do what plaintiff can do directly? To say yes means that substance is disregarded, that mere words confer upon the people some sort of right or interest counter to the monopoly, when by the terms of the bargain the people agreed to claim none until Grant's deed to them shall have matured.

The indictments here charge the defendants Wayne Pump Company, G & B, and Tokheim with "using the Jauch patent" for the purpose of fixing prices among themselves on the sales of computer pumps, and for the purpose of restricting the manufacture and sale of such pumps. There is

no charge that defendants fixed the prices of gasoline pumps generally, or restricted their manufacture and sale. They are charged only with fixing the prices of computer pumps, a right which the Wayne Pump Company already had under the statutory monopoly granted by the Government when its patent was issued. What is meant by the phrase "used the Jauch patent" is not quite clear. If the defendants did more than enter into ordinary patent license agreements, under the terms of which the Wayne Pump Company, as owner of the patent, licensed the others to manufacture computer pumps, and fixed the prices at which the pumps should be sold; or if the Government claims that these defendants were involved in some offense under the Sherman Act other than the exercise of a patent monopoly, then such offense should be set out clearly in the indictments.

While ownership of the patent gives to the patentee a complete monopoly within the field of his patent, it of course does not give him any license to violate the provisions of the Sherman Act or any other law. Under his monopoly he may not use his patent as a pretext for fixing prices on an unpatented article of commerce; nor fix the resale price on his patented article; nor make use of "typing clauses." In the case of *United States v. Standard Sanitary Manufacturing Co.*, 226 U. S. 20, the patent owner and its licensees entered into a scheme for fixing prices on a common article of commerce—unpatented bath tubs—and then by a pretended use of a process patent attempted to evade the Sherman Act. This is obviously not the instant case, and the indictments do not allege that

there was any understanding or agreement among the defendants to use the patent to fix prices on any unpatented article. In fact there is no allegation that there was any understanding or agreement among the defendants at all, aside from the allegation that they "knowingly have entered into and engaged in a combination and conspiracy to fix and maintain noncompetitive prices and to monopolize the manufacture and sale of computer pumps and computing mechanisms, by the doing of the things set out." The things and means then set out are things which I believe the patentee, under its patent, already had the right to do.

The Government argues that the instant case and the *Bath Tub Case* have one basic common theme, that is conspiracy, joint action, agreement to use the patent for the purpose of fixing prices among themselves. The difficulty is that the Government fails to set out any identifying facts to show that the Wayne Pump Company and its licensees did anything more than the law permitted them to do under the monopoly granted by the patent. How they took joint action or entered into joint agreements to use the Jauch patent to achieve the alleged illegal objectives, or how they went outside the monopoly granted to the patentee and its licensees, is nowhere set out in the indictments.

The indictments also allege, as another of the means used to accomplish the illegal objectives, that the defendant Wayne Pump Company, with the consent of G. & B. and Tokheim, approached gasoline pump manufacturers purchasing computing mechanisms from Neptune, and other gasoline

pump manufacturers using computing mechanisms of their own make in the manufacture of computer pumps, and attempted to induce each of such manufacturers to accept a license under the Jauch patent; and that the Wayne Pump Company, with the authorization of G. & B. and Tokheim, would issue such license to each of such manufacturers on terms securing to the defendants control of all of the new licensee's patents on computing mechanisms and computer pumps and of the licensee's prices for the sale of computer pumps. Also that the defendant Wayne, with the consent of G. & B. and Tokheim, attempted to compel Neptune, the sole manufacturer and seller of computing mechanisms other than Veeder, to forever acknowledge the validity of the Jauch patent, to submit all patents on computer pumps and computing mechanisms owned or controlled by Neptune to uses determined by Wayne, and to refrain from manufacturing or selling computing mechanisms except to customers approved by Wayne, G. & B. and Tokheim.

Again it is not clear what is meant by the allegation that defendants attempted to compel Neptune to submit all patents owned or controlled by it on computer pumps "to uses determined by Wayne." With the issuing of the Jauch patent the Wayne Company dominated the computer pump field. In fact the indictments allege that the public demanded the new invention and that nineteen gasoline pump manufacturers ceased to do business because they did not have licenses to manufacture the computer pump. The entire world, other than the Wayne Company, was ex-

cluded for seventeen years from making, using or selling computer pumps, or any combination machine or unit which embodied the five elements described by Judge Slick in the case of *Wayne Company v. Anchor Oil Company*, 20 Fed. Supp. 745, as follows:

- (1) A source of liquid supply. (2) A pump, the suction side of which is connected to said source of liquid supply. (3) A meter.
- (4) A registering means operated by said meter for registering the liquid dispensed and the cost thereof. (5) Means for changing the relation between the cost operating portion whereby the unit cost per unit amount dispensed may be varied.

Judge Slick held the Jauch patent valid, and that the Neptune Company (manufacturer of computing mechanisms which were ultimately sold to the Anchor Company) was an infringer of the Wayne patent. The Neptune Company and the Anchor Oil Company were thereafter precluded from manufacturing, selling or using computer mechanisms for computer pumps, and all gasoline pump manufacturers who purchased computing mechanisms from them and used the same in the manufacture of computer pumps would also be infringers. Under these conditions I fail to see how defendants aided in carrying out an unlawful conspiracy because defendant Wayne Company, with the consent of G. & B. and Tokheim, approached gasoline pump manufacturers, who had purchased computer mechanisms from Neptune and other manufacturers, and attempted to induce them to accept licenses under the Jauch patent. If in attempting to induce these manufacturers to

accept such licenses, the Wayne Company, or any other of the defendants, made use of unlawful means, then those facts should be set out in the indictments. The indictments complain that an indispensable element of every computer pump is the computing mechanism, and without a source of supply of such mechanisms a manufacturer cannot make computer pumps. Under Judge Slick's decision, even with a supply of computer mechanisms no manufacturer can use them in the manufacture of computer pumps, save only as he is licensed by the Wayne Company to do so. Judge Slick held that the Jauch patent covered a meter and a registering means operated by said meter for registering the liquid dispensed and the cost thereof. It therefore follows that everyone making, using or selling this computer mechanism in connection with a computer pump would be an infringer.

The indictment also charges as one of the means or devices used in bringing about the combination or conspiracy that "the defendants Veeder, G. & B. and Tokheim acknowledge the validity of the Jauch patent." When G. & B. became licensees they were estopped from denying the validity of their licensor's patent, and I see nothing illegal or unlawful in the licensor requiring of them that they acknowledge the validity thereof, especially, as here, where its validity had already been established by the United States District Court of Indiana. Agreements which provide that licensees recognize the validity of the patent beyond the termination of the license are valid agreements. *United Shoe Machinery Co. v. Caunt*, 134 Fed. 239;

Eskimo Pie Corp. v. National Ice Cream Co., 20 Fed. (2d) 1003; 26 Fed. (2) 901. If any unlawful means were used in securing this acknowledgment, then the indictments should set them out clearly enough for defendants to meet these charges. Another means or device complained of in the indictments is that defendants determined jobbers resale prices for computer pumps, refused to sell computer pumps to any jobber failing or refusing to adhere to such resale prices, and that they eliminate discounts to all jobbers in the event of a general failure by jobbers to adhere to the said resale prices.

In a long line of decisions the United States Supreme Court has held that attempts to regulate future prices or future marketing of a patented article after complete sale by the owner thereof, were not valid exercises of the patent monopoly, and amounted to unlawful restraint of trade, invalid at common law, and, so far as interstate commerce was concerned, invalid under the Sherman Anti Trust Act of July 2, 1890. *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U. S. 373; *U. S. v. Schraders Sons*, 252 U. S. 85; *Boston Store v. American Graphophone Co.*, 246 U. S. 8; *Sraus v. Victor Talking Machine Co.*, 243 U. S. 490.

The charge in the instant indictments is that "the said defendants determine jobbers' resale prices for computer pumps, refuse to sell computer pumps to any jobber failing or refusing to adhere to such resale prices, and eliminate discounts to all jobbers in the event of a general failure by jobbers to adhere to said resale prices." However, no facts are set out to show that the Wayne com-

puter pumps were sold through jobbers, nor are the names of any specific jobbers given with whom these defendants carried on negotiations wherein the resale price of computer pumps was determined. In the case of *United States v. Colgate & Co.*, 253 Fed 522, affirmed by the United States Supreme Court in 250 U. S. 300, defendant was indicted for conspiracy to fix the resale price at which wholesale and retail dealers might sell its product, the reference being to wholesalers and retailers generally, as is the reference in the instant indictments to jobbers generally. In the *Colgate* case the court said:

It does not seem to the court that the alleged offense with which defendant is charged is stated and set forth with that degree of accuracy and certainty required in criminal pleading. The facts in no particular combination, against any one set of wholesalers or retailers alleged to have been in combination with the defendants, are given, but merely that assurances and promises were made by the wholesale and retail dealers, doing business with the defendant throughout the United States and the Eastern District of Virginia, that its products would not be resold at retail other than at prices fixed by the defendant. This language is too general, and the defendant has the right at least to be informed of some one particular infraction of the law that it is claimed it has committed. It would be impossible to intelligently prepare a defense or answer to this indictment, as it involves defendant's dealings with its wholesale and retail customers throughout the territory named, covering a period of three

years. This is too indefinite, and there ought to be no difficulty, if such conditions exist, as set forth in the indictment, to name some specific instance of the alleged combination and state the same in detail.

So in the case at bar, if these conditions exist, the Government should have no difficulty in setting forth at least one specific instance of where defendants determined the resale price at which jobbers might resell computer pumps. If this condition does exist, surely the Government must be in possession of the facts, and they should be set out in the indictments, so as to reasonably inform defendants of the offense with which they are charged.

"Tying clauses" are also prohibited by Section 3 of the Clayton Act (U. S. C. A.), Title 15, Sec. 14) but no facts are set out in the present indictments which charge defendants with the creation of a monopoly by means of "tying clauses."

The Government in its argument insists that competing patents are here involved, and that a monopoly of competing patents was acquired by some of the defendants in furtherance of the plan to carry out the conspiracy, but the indictments set out no facts whereby to identify these competing patents, nor in what manner nor by whom such monopoly in them was acquired. The Government also insists that not one but many patents on computer pumps, computing mechanisms and improvements thereon were used to achieve the illegal purpose or conspiracy, but again the indictments are silent as to the identity of the other patents aside from the Jauch patent issued in November

1932. The indictments set out that changes in types of gasoline pumps have paralleled the major changes and improvements in the manufacture of automobiles; and that upon the advent of the computer pump it was so favored by the public that there was a marked shift from noncomputer pumps to the computer type, and that it thereupon became impossible for any gasoline pump manufacturer to continue to engage in such business unless he manufactured computer pumps. The Jauch patent dominated the computer pump field, and gave to its owners the right to exclude therefrom all others. As the indictment points out, the computer pump was so favored by the public that there was a definite shift to this type of pump, and it thereupon became impossible for any manufacturer to continue to engage in such business unless he manufactured the computer type of pump. This is the very thing they could do only with the permission of the Wayne Company and upon its terms and conditions. As said before, upon the issuance of the Jauch patent by the United States Government, the owner thereof was granted an absolute monopoly on the manufacture and sale of computer pumps at any price it chose to fix for same. Over and above this complete monopoly, I fail to see how the owner of the patent and its licensees could engage in any further and unlawful monopoly, unless they went outside of the domain of the patent and were guilty of doing things which the law does not permit them to do, and no factual allegations are set out in the indictments to show that they did this. I have read the indictments in their entirety several times, and in

the various means, acts and devices whereby the combinations and conspiracies are alleged to have been accomplished, I do not find that defendants are charged with the doing of anything which they did not already have the right, under the patent, to do. The fixing of prices and monopoly to manufacture and sell computer pumps, here complained of, were the very rights which the Wayne Company and its licensees enjoyed by reason of ownership of the patent. The courts have been unanimous in this construction of the rights of a patentee. If, in the interest of public policy, the monopoly which the patent laws confer upon an inventor seem too broad, redress must come from Congress not from the courts.

It is fundamental that in every indictment the defendant is entitled to be informed with such definiteness and certainty of the accusations against him as will enable him to make his defense, and avail himself of acquittal or conviction in any further prosecution for the same offense. Having in mind that the subject matter of the instant indictments is protected by a patent, I am of the opinion that the defendants here have not been furnished with such definite and particular allegations of fact as will meet this test. The charges are much too general. They do not adequately describe the nature of the alleged unlawful conspiracy agreements or arrangements which defendants are accused of having made, nor show how the defendants became parties thereto, nor how they collaborated in doing the unlawful things; nor set out any unlawful means whereby the unlawful objectives were accomplished.

Believing as I do, for the reasons heretofore stated, that the indictments are insufficient, the demurrers thereto will be sustained.

Enter.

(Sgd.) PHILIP L. SULLIVAN,
Judge.

FEBRUARY 17, 1942.



No. 1172 82

In the Supreme Court of the United States

OCTOBER TERM, 1941

THE UNITED STATES OF AMERICA, APPELLANT

v.

THE WAYNE PUMP COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

STATEMENT AS TO JURISDICTION



**In the District Court of the United States
for the Northern District of Illinois,
Eastern Division**

No. 32598 (Cr.)

UNITED STATES OF AMERICA

v.

THE WAYNE PUMP COMPANY, ET AL.

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the United States of America submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the District Court entered in this cause on February 24, 1942. A petition for appeal was filed on March 26, 1942, and is presented to the District Court herewith, to wit, on the 26th day of March 1942.

JURISDICTION

The jurisdiction of the Supreme Court to review by direct appeal the judgment entered in this cause is conferred by the Act of March 2, 1907, 34 Stat. 1246, as amended (18 U. S. C. § 682), commonly known as the Criminal Appeals Act, and by 28 U. S. C. § 345.

The following decisions sustain the direct appellate jurisdiction of the Supreme Court to review the judgment in this cause on the ground that the judgment is based upon a construction of the statute on which the indictment is founded. *United States v. Patten*, 226 U. S. 525; *United States v. Carter*, 231 U. S. 492; *United States v. Colgate & Co.*, 250 U. S. 300; *United States v. Hastings*, 296 U. S. 188; *United States v. Borden Co.*, 308 U. S. 188; *United States v. Hutcheson*, 312 U. S. 219.

STATUTE INVOLVED

The statute of the United States, the construction of which is involved, is Section 2 of the Act of July 2, 1890, 26 Stat. 209, as amended (15-U. S. C. § 2), commonly known as the Sherman Act, which provides:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

THE ISSUES AND THE RULING BELOW

This case is a companion case to *United States v. The Wayne Pump Company, et al.*, No. 32597 (Cr.), D. C., N. D., Ill., and the District Court filed

a single opinion sustaining demurrers in both cases. The only substantial difference between the cases is that the indictment here charges violations of Section 2 of the Sherman Act, whereas the indictment in the companion case is based upon a violation of Section 1 of the Sherman Act.

The instant indictment is in two counts and was returned on January 31, 1941. Count I charges The Wayne Pump Company (Wayne), Gilbert and Barker Manufacturing Company (G & B), Tokheim Oil Tank and Pump Company (Tokheim), all manufacturers of gasoline pumps, and Veeder-Root, Incorporated (Veeder), a manufacturer of gasoline computing mechanisms, together with certain of their officers, with a continuing conspiracy from 1932 to the date of the indictment to monopolize the manufacture and sale of computer pumps. Computer pumps are gasoline pumps embodying a computing mechanism which calculates and registers the quantities and prices of gasoline dispensed. Count II charges the same defendants with a continuing conspiracy from 1932 to the date of the indictment to monopolize the manufacture and sale of computing mechanisms.

The allegations of the indictment may be summarized as follows:

In 1932 Wayne obtained a patent known as the Jauch patent on a computer pump. Wayne then entered into arrangements with Veeder for the latter to develop a commercially feasible computing mechanism, an indispensable element of every

computer pump. Since 1938 Veeder has been the sole manufacturer of computing mechanisms for gasoline pumps.

Wayne, G & B, and Tokheim are the three leading manufacturers of gasoline pumps, selling 56 percent of all computer pumps sold in the United States in 1939. In the same year these three companies, together with eight other manufacturers licensed by Wayne, made all of the computer pumps sold in the United States, constituting 91 percent of the dollar volume of all gasoline pumps sold that year.

In describing the alleged conspiracy to monopolize the manufacture and sale of computer pumps, Count I alleges, *inter alia*, that it was part of the conspiracy that Wayne, G & B, and Tokheim should use the Jauch patent to restrict the manufacture and sale of computer pumps to themselves. It then charges that Wayne was to license G & B and Tokheim under the Jauch patent and acquire control of all patents on computer pumps and computing mechanisms competitive with computer pumps manufactured by Wayne, G & B, and Tokheim or with computing mechanisms manufactured by Veeder. Veeder was to acquire control of all patents on competitive computing mechanisms and convey them, together with any of its own, to Wayne. Wayne was to determine the use of all patents on computer pumps and computing mechanisms owned by G & B and Tokheim and was to

cause owners of patents declared by the United States Patent Office to be in interference with the Jauch patent to file concessions of priority. Wayne, G & B, and Tokheim were to buy computing mechanisms only from Veeder and Veeder was to sell them only to Wayne, G & B, and Tokheim and those approved by them.

Count I further alleges that Wayne was to issue no other licenses under the Jauch patent except with the consent of G & B and Tokheim and upon terms authorized by them. Wayne was to induce computer pump manufacturers using mechanisms not made by Veeder to accept licenses under the Jauch patent on terms securing to Wayne, G & B, and Tokheim control of the licensees' patents and official personnel. Wayne was also to compel Neptune Meter Company, which, prior to 1938, was engaged in the manufacture and sale of computing mechanisms and was Veeder's sole competitor in that business, to submit its patents to Wayne's control and refrain from selling computing mechanisms except to customers approved by Wayne, G & B, and Tokheim. Wayne, G & B, and Tokheim were to share litigation expenses incurred in enforcing the licenses of licensees other than G & B and Tokheim and were to share royalty payments made by such licensees.

In describing the alleged conspiracy to monopolize the manufacture and sale of computing mechanisms, Count II first alleges that it was a part of

such conspiracy that Wayne, G & B, and Tokheim should use the Jauch patent for the purpose of controlling the manufacture and the purchase of computing mechanisms for use in gasoline pumps. The remaining terms of the conspiracy charged in Count II are the same as those in Count I.

Demurrers to the indictment filed on behalf of all defendants were sustained by the District Court. The court rendered one opinion covering both this case and the companion case in which the defendants herein are charged with fixing prices in violation of Section 1 of the Sherman Act. The court's reasons for sustaining demurrers to the present indictment are not clear except insofar as the ruling may be said to follow from the conclusions expressed in the opinion directed primarily to the price-fixing indictment. The opinion specifically refers to those allegations in the indictment charging that it was a part of the conspiracy (1) that the defendants use the Jauch patent for the purpose of fixing prices, (2) that they obtain control over all other patents on computer pumps and computing mechanisms and induce other manufacturers to accept licenses under the Jauch patent on terms securing to the defendants control of their prices, and (3) that the defendants Veeder, G & B, and Tokheim acknowledge the validity of the Jauch patent. The court held that these were things which could lawfully be done under the monopoly secured by the Jauch patent. The other allega-

tions, although not specifically mentioned by the court, were disposed of by the following statement in the opinion:

I have read the indictments in their entirety several times, and in the various means, acts and devices whereby the combinations and conspiracies are alleged to have been accomplished, I do not find that defendants are charged with the doing of anything which they did not already have the right, under the patent, to do.

Although there are several statements in the opinion to the effect that certain allegations of the indictment are not clear or are indefinite and uncertain, and to the effect that if the Government charges that the defendants did something beyond the scope of the patent privilege, it is not clearly set out in the indictments, a fair reading of the opinion in its entirety makes plain that the decision rests upon the ground that no violation of the Sherman Act is alleged because the patent privilege exempts the acts charged from the prohibitions of that Act. It seems clear that the court, in stating that certain allegations were insufficient in form, meant that if those allegations were intended to charge anything beyond what the court found to be exempt from the Sherman Act by reason of the patent privilege, the allegations fail to do so in clear and certain terms. This interpretation of the opinion is supported by the fact that all of the decisions relied upon by the court to reach its conclu-

sion relate to the scope of the Sherman Act and the patent law. We believe, therefore, that the decision cannot be said to be based upon the independent ground of indefiniteness, and accordingly that it is subject to review by this Court. *United States v. Borden Co.*, 308 U. S. 188; *United States v. Patten*, 226 U. S. 525; *United States v. Hastings*, 296 U. S. 188.

THE QUESTIONS ARE SUBSTANTIAL

The questions involved are substantial and of public importance. The effect of the decision of the District Court is to hold that a dominant group in an industry may combine and conspire to use a patent owned by one of the conspirators for the purpose of securing a total monopoly of the manufacture and sale of important articles of commerce. We submit that this ruling is contrary to settled decisions holding that a conspiracy entered into for the purpose of suppressing competition in an article is none the less illegal because one of the parties holds a patent on the article and could, acting alone and voluntarily, have lawfully imposed the same restraints on competition (*Interstate Circuit, Inc. v. United States*, 306 U. S. 208, 228-230), and that a combination between owners of different patents, formed for the purpose of effecting a monopoly or fixing prices, is violative of the Sherman Act. *National Harrow Co. v. Hench*, 83 Fed. 36 (C. C. A. 3); *Blount Mfg. Co. v. Yale & Towne Mfg. Co.*, 166 Fed. 555 (C. C. D. Mass.); see

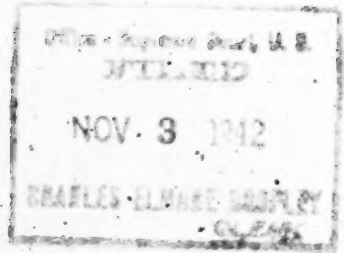
Standard Oil Co. v. United States, 283 U. S. 163, 174-175; *Straus v. American Publishers' Ass'n*, 231 U. S. 222.

A complete review of the decision of the District Court is highly desirable. The United States has appealed from the ruling in the companion case to this (No. 32597), which was decided in the same opinion, and a full review cannot be had unless both cases are considered. In any event, this case presents questions of substance which warrant review by the Supreme Court.

Respectfully submitted.

/s/ CHARLES FAHY,
Charles Fahy,
Solicitor General.

(CLERK'S NOTE—The opinion of the District Court is printed as an appendix to the Jurisdictional Statement in the case of *The United States of America v. Wayne Pump Company et al.*, No. 1171, October Term, 1941.)



Nos. 81, 82

In the Supreme Court of the United States

OCTOBER TERM, 1942

THE UNITED STATES OF AMERICA, APPELLANT

v.

THE WAYNE PUMP COMPANY, ET AL.

THE UNITED STATES OF AMERICA, APPELLANT

v.

THE WAYNE PUMP COMPANY, ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 81

THE UNITED STATES OF AMERICA, APPELLANT

v.

THE WAYNE PUMP COMPANY, ET AL.

No. 82

THE UNITED STATES OF AMERICA, APPELLANT

v.

THE WAYNE PUMP COMPANY, ET AL.

**ON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION**

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the district court (R. 27-43) ¹
is reported in 44 F. Supp. 949.

¹ All record references to the opinion will be to the record
in No. 81.

JURISDICTION

The jurisdiction of this Court is invoked on direct appeals taken under the Act of March 2, 1907, c. 2564, 34 Stat. 1246, as amended by the Act of May 9, 1942, 56 Stat. 401 (18 U. S. C. 682), known as the Criminal Appeals Act, and Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936 (28 U. S. C. 345). The orders of the district court sustaining demurrers to the indictments were entered on February 24, 1942 (No. 81, R. 43; No. 82, R. 45). The orders allowing appeal were entered on March 26, 1942 (No. 81, R. 45; No. 82, R. 47). On April 10, 1942, appellces filed a statement opposing the jurisdiction of this Court. This Court, on May 25, 1942, postponed further consideration of the question of jurisdiction to the hearing of the cases on the merits (No. 81, R. 48; No. 82, R. 50).

QUESTIONS PRESENTED

1. Whether the Court has jurisdiction of these appeals under the Criminal Appeals Act.
2. Whether the indictments charge activities which are not protected by the patent laws and which violate the Sherman Act.

STATUTES INVOLVED

The statutes primarily involved are Sections 1 and 2 of the Act of July 2, 1890, c. 647, 26 Stat. 209, as amended by the Act of August 17, 1937, c. 690, 50 Stat. 693 (15 U. S. C. 1, 2), known as

the Sherman Act. They provide in part as follows:

SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * *

SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor * * *

The Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246, as amended by the Act of May 9, 1942, 56 Stat. 401 (18 U. S. C. 682), under which the jurisdiction of this Court is invoked reads in part as follows:

That an appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances, to wit:

From a decision or judgment quashing, setting aside, or sustaining a demurrer * * * to any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment * * * is founded.

STATEMENT

These are direct appeals from judgments of the District Court for the Northern District of Illinois, Eastern Division, sustaining demurrers to two indictments founded upon the Sherman Act. Both indictments relate in general to the same activities; and the demurrers were heard together and disposed of by the district court in one opinion. Therefore, the appeals are being briefed and argued together in this Court.

1. THE INDICTMENTS

The indictment in No. 81 (R. 4-19) charges a conspiracy to fix the prices for the sale of computer pumps in interstate trade and commerce in violation of Section 1 of the Sherman Act. The indictment in No. 82 (R. 3-21) charges in the first count a conspiracy to monopolize the manufacture and sale of computer pumps, and in the second count a conspiracy to monopolize the manufacture and ^{sale} ~~purchase~~ of computing mechanisms, both in violation of Section 2 of the Sherman Act.

The defendants named in the price-fixing indictment (No. 81) are (R. 5-6): The Wayne Pump Company (Wayne), Gilbert and Barker Manufacturing Company (G & B), and Tokheim Oil Tank and Pump Company (Tokheim), all of whom are manufacturers and sellers of computer pumps, and certain officers of Wayne and G & B;

Veeder-Root, Incorporated (Veeder), a manufacturer of computing mechanisms, and certain of its officers; and Gasoline Pump Manufacturers Association (Association), an association of gasoline pump manufacturers of which Wayne, G & B, and Tokheim are members, and its secretary.

The defendants named in the monopoly indictment (No. 82) are the same, except that the Association and its secretary are not included (R. 4-5).

The articles of trade involved are (1) computer pumps, which are gasoline pumps embodying a computing mechanism (No. 81, R. 5; No. 82, R. 4), and (2) computing mechanisms, which are mechanical devices designed to calculate and register simultaneously the quantity and price of gasoline dispensed by the pump and which therefore are indispensable parts of computer pumps (No. 81, R. 5, 9; No. 82, R. 4, 8).

According to the indictments, the first computer pump was placed on the market in 1933. By 1939, the value of computer pumps sold comprised 91 percent of the dollar volume of all the gasoline pumps sold in the United States. The demand has shifted so rapidly from non-computer to computer pumps that in recent years it has been practically impossible for any gasoline pump manufacturer to remain in business unless he manufactured computer pumps. (No. 81, R. 8; No. 82, R. 7.)

In 1932 Wayne obtained a patent on a computer pump, known as the Jauch patent (No. 81, R. 8-9; No. 82, R. 7). Prior to that time, however, and during the period covered by the indictment, numerous other applications have been filed in the patent office for letters patent on computer pumps, computing mechanisms, and improvements thereon, and numerous patents on such subjects have been issued (No. 81, R. 8; No. 82, R. 7).

Wayne, G & B, and Tokheim are the three leading manufacturers of gasoline pumps in the United States. In 1939, they manufactured and sold 56 percent by value of all computer pumps sold in the country. In the same year, they, together with eight other manufacturers licensed under the Jauch patent, produced and sold all of the computer pumps sold in the United States. (No. 81, R. 10; No. 82, R. 9.)

Veeder, since 1938, has been the sole manufacturer of computing mechanisms in this country (No. 81, R. 10; No. 82, R. 9), although prior to that time Neptune Meter Company (Neptune) manufactured and sold computing mechanisms to manufacturers of computer pumps who were in competition with Wayne, G & B, and Tokheim. Likewise, prior to 1938 other computer pump manufacturers produced computing mechanisms for use in their pumps, which were sold in competition with computer pumps made by Wayne, G & B, and Tokheim. (No. 81, R. 9-10; No. 82, R. 8-9.)

All of the appellee manufacturers sell their products in interstate commerce. Also, the other manufacturers licensed under the Jauch patent sell their computer pumps to purchasers outside the state of manufacture. Prior to 1938, when it was in the business, Neptune sold its computing mechanisms in interstate commerce. (No. 81, R. 9-10; No. 82, R. 8-9.)

Upon the inducements summarized, the indictments make specific charges, which are in many respects the same. We shall, therefore, detail the charges in the price-fixing case (No. 81) and then point out those respects in which the monopoly charges (No. 82) differ.

A. The price-fixing indictment.—This indictment charges that continuously since 1932 the defendants have “engaged in a combination and conspiracy to fix, maintain, and control arbitrary, artificial, and noncompetitive prices for the sale of computer pumps” (R. 10-11). The indictment then describes a conspiracy to regulate the entire industry from manufacturer to consumer, using as a device to accomplish that purpose the Jauch patent. The specific allegations (R. 11-13) may be summarized in three groups:

The use of the Jauch patent to dominate the industry and to suppress manufacture under competing patents.—The appellees Wayne, G & B, Tokheim, and Veeder agreed to give Wayne’s Jauch patent a dominating position in their

operations. Wayne was to license G & B and Tokheim to make, use, and sell computer pumps, while they were to submit to the determination of Wayne the use of all patents owned or controlled by them and to acknowledge the validity of the Jauch patent. Likewise, Veeder was to convey to Wayne all of its patents on computing mechanisms and parts thereof, and to acknowledge the validity of the Jauch patent. Veeder was to manufacture computing mechanisms and sell them only to Wayne, G & B, and Tokheim, and purchasers approved by them. In return, Wayne, G & B, and Tokheim agreed to purchase computing mechanisms only from Veeder.

All competitors outside the conspiracy were also to be brought under the control of the Jauch patent. Thus, Wayne was to acquire ownership or control of all competing patents on both computer pumps and computing mechanisms. Veeder was to assist by acquiring and conveying to Wayne competing patents on computing mechanisms. Wayne, with the consent of G & B and Tokheim, was to induce all other manufacturers of computer pumps to accept licenses under the Jauch patent upon terms securing to Wayne control of the licensees' patents on computer pumps and computing mechanisms; also, Wayne was to require all such new licensees to accept substitute licenses on terms protecting the validity of the Jauch patent in perpetuity.

Wayne was to license no one, however, except with the consent of G & B and Tokheim and upon terms authorized by them. Wayne also was to compel Neptune, the sole competitor of Veeder in the sale of computing mechanisms, to acknowledge forever the validity of the Jauch patent, to submit all patents owned or thereafter acquired by it to uses determined by Wayne, to refrain from manufacturing computing mechanisms except with the approval of Wayne, and to refrain from selling except to customers approved by Wayne, G & B, and Tokheim. In addition, Wayne was to cause the owners of all patents declared to be in interference with the Jauch patent to file concessions of priority in the Patent Office.

The use of the Jauch patent to fix manufacturers' prices.—In addition to the general charge of a conspiracy "to fix * * * arbitrary, artificial, and noncompetitive prices", the indictment charges specifically that it was agreed that Wayne, G & B and Tokheim would devise a formula for determining prices for the sale of computer pumps, on the basis of which Wayne would determine and announce the prices together with other terms and conditions of sale (including commissions and discounts) fixed by agreement. Wayne, as well as G & B and Tokheim, agreed to adhere to the prices, discounts, terms and conditions thus announced.

The prices of all other² manufacturers were to be controlled by including in the licenses to be issued by Wayne (see p. 8, *supra*) provisions securing to Wayne, G & B and Tokheim control of the licensees' prices.

The agreement to fix jobbers' resale prices.—The indictment further alleges that Wayne, G & B, and Tokheim agreed upon jobbers' resale prices, and agreed to boycott jobbers who did not adhere to such prices and to eliminate all jobber discounts in the event of a general refusal to adhere to such prices (R. 12).

The defendant Association was to assist in enforcing both the manufacturers' selling prices and the jobbers' resale prices by instructing sales managers and salesmen of Wayne, G & B, and Tokheim, and of other manufacturers licensed by Wayne, to adhere to the agreed prices, discounts, and terms of sale, and by urging jobbers to adhere to the agreed resale prices (R. 13).

The indictment also contains a number of other specific charges which, although significant, are not essential to the questions presented upon this appeal and therefore need not be detailed here.³

² One important group of allegations not included in the above summary concerns the attempt of the appellees to prevent the conversion of non-computer pumps into computer pumps. It is alleged that the appellees agreed to refrain from using computing mechanisms to convert non-computer pumps into computer pumps, to refuse to sell computing mechanisms for such use, and to restrict and discourage the sale of non-computer pumps. (R. 12.) In setting forth

Following the charges, the price-fixing indictment alleges that the objects of the conspiracy have been accomplished and mentions among others the following results (R. 13): the appellees have secured ownership or control of all patents on computing mechanisms and computer pumps; they have secured control of all manufacturing sources of computing mechanisms, and have restricted the manufacture of such mechanisms to Veeder; they have restricted the manufacture of computer pumps to Wayne and its licensees; they have prevented the use of computing mechanisms

the acts done pursuant to the conspiracy it is alleged that John Wood Manufacturing Company, Inc., was induced to accept a license under the Jauch patent, which was substantially similar to licenses issued to other manufacturers at about the same time, one of the terms of which required them to refrain from using computing mechanisms to convert non-computer pumps into computer pumps (R. 14).

Another important group of allegations shows the purpose of the appellees to exploit the Jauch patent for their joint benefit. It is alleged that Wayne, G & B and Tokheim were to divide royalty payments made by other licensees and to share litigation expenses; that Wayne was to charge each of the other licensees with violations of its license; and that under threat of cancellation the other licensees were to be compelled to accept new licenses securing to appellees "control of the ownership and official personnel of the licensee". (R. 13.)

Most of the other allegations not summarized in the text deal with minor details in furtherance of the conspiracy. For example, it is alleged that the appellees agreed that Wayne would secure for itself and its licensees special rights under patents on devices pertaining to the operation of computer pumps which are required by State Sealers or Fire Underwriters (R. 11).

to convert non-computer pumps into computer pumps; they have eliminated discounts to jobbers, thereby driving jobbers from the business of buying and selling computer pumps; and they have fixed arbitrary and non-competitive prices for the sale of computer pumps (R. 16-17).

B. *The monopoly indictment.*—Count one of the monopoly indictment charges that continuously since 1932 the defendants have “engaged in an unlawful combination and conspiracy to monopolize the manufacture and sale of *computer pumps* in * * * interstate trade and commerce”^{*} (R. 9). The details of the charge are the same as those set forth in the price-fixing indictment, except that the allegations concerning price fixing are omitted. Likewise, the alleged results of the conspiracy are the same as those described in the price-fixing case, with the same exception.

Count two of the monopoly indictment charges that continuously since 1932 the defendants have “engaged in an unlawful combination and conspiracy to monopolize the manufacture and sale of *computing mechanisms* * * * in interstate trade and commerce”^{*} (R. 15-16). The allegations setting forth the terms and results of the conspiracy are substantially the same as those in count one.

^{*} Italics added.

^{*} Italics added.

2. OPINION AND ORDERS OF THE COURT BELOW

The appellees filed demurrers to the indictments (No. 81, R. 19-26; No. 82, R. 21-28). On February 24, 1942, the court below filed an opinion (R. 33-43), and on the same day orders were entered sustaining the demurrers (No. 81, R. 43; No. 82, R. 45). The ground of the decision is in dispute. The Government contends that it appears from the opinion that the decision is based upon a construction of the Sherman Act, and has taken direct appeals to this Court. The appellees in their Statement Opposing Jurisdiction argue that the sole basis of the decision is that the indictments are so indefinite as to be fatally deficient under the Sixth Amendment, or, in the alternative, that this alleged fault is one independent ground of the decision. This Court, on May 25, 1942, postponed further consideration of the question of jurisdiction to the hearing on the merits (No. 81, R. 48; No. 82, R. 50)..

SPECIFICATION OF ERRORS TO BE URGED

The district court erred in each case:

1. In sustaining the several demurrers interposed to the indictment (Assignments of Error No. 1 in No. 81, R. 44; and No. 1 in No. 82, R. 46).

2. In holding that the objectives of the conspiracies alleged in the indictments are ones which

a patentee and those combining with him may lawfully entertain and use under the patent laws, and therefore do not constitute violations of the Sherman Act (Assignments of Error No. 2 in No. 81, R. 44; and No. 2 in No. 82, R. 47).

3. In holding that the means set out for effectuating the objectives charged in the indictments are means which a patentee and those combining with him may lawfully entertain and use under the patent laws of the United States, and therefore do not constitute violations of the Sherman Act (Assignments of Errors No. 2 in No. 81, R. 44; and No. 2 in No. 82, R. 47).

4. In holding that the objectives of the conspiracies alleged in the indictments together with the means alleged in the indictments for effecting those objectives are aims and means which a patentee and those combining with him may lawfully entertain and use under the patent laws, and therefore do not constitute violations of the Sherman Act (Assignments of Error No. 2 in No. 81, R. 44-45; and No. 2 in No. 82, R. 47).

SUMMARY OF ARGUMENT

I

Under the Criminal Appeals Act this Court has jurisdiction of a direct appeal from a decision sustaining a demurrer to an indictment when such decision "is based upon the * * * construction of the statute upon which the indictment is founded." In the instant case the district court

held that the charges made in the indictments did not constitute violations of the Sherman Act, and then went on to say that the indictments did not charge with sufficient definiteness acts which the court considered would be violations of the Sherman Act. The decisions, therefore are appealable to this Court. The reason there is no jurisdiction when the judgment of the district court rests upon some independent ground other than its interpretation of the statute is that for the Court to construe the statute in such case would be for it to render an advisory opinion upon an abstract question, since it cannot examine the independent ground and therefore must in any event affirm the judgment. But this reason is inapplicable here. The district court held that the indictments as a matter of substance do not charge crimes within the meaning of the Sherman Act as construed by the court, and simply continued on to say that if the indictments were intended to charge crimes within the meaning of the Act as construed by the court, then they are defective as pleadings. Consequently the orders of the district court cannot stand upon the second ground alone; its orders necessarily are "based upon" its construction of the Sherman Act and under the Criminal Appeals Act direct appeals will lie.

There is also a broader ground upon which the jurisdiction of this Court to decide the substantive questions may be rested. The principles de-

termining the jurisdiction of this Court under the Criminal Appeals Act. have been developed by analogy to appeals from state court judgments. In such cases this Court will decide the federal question if the non-federal grounds put forward are without any fair or substantial support. We submit that the analogy is apposite here. The suggestion that both indictments are void for indefiniteness is utterly lacking in merit. Regardless of the grounds of the decision below, therefore, this Court has jurisdiction to determine whether the indictments charge conduct which violates the Sherman Act.

II

The price-fixing indictment.—The indictment in No. 81 alleges that the purpose and effect of the combination have been to fix arbitrary and non-competitive prices for the sale of computer pumps. This was not accomplished by legitimate use of the Jauch patent. It was accomplished by combination: by an agreement among dominant manufacturers to grant to Wayne control of their patents and to manufacture and sell under Wayne's Jauch patent at prices fixed by mutual agreement; by inducing other manufacturers to accept licenses under the Jauch patent upon terms securing to Wayne control of their patents and to the three dominant manufacturers control of their prices; by agreement with appellee Veeder that

Veeder should sell the computing mechanisms necessary to computer pumps only to approved manufacturers; by compelling Neptune, Veeder's sole competitor in the manufacture and sale of computing mechanisms, to surrender control of its patents and to manufacture and sell only to the extent allowed by the conspirators; and by a boycott of any jobber who refused to adhere to resale prices fixed by the conspirators. Such a combination is unlawful *per se* under the decisions in *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, and *United States v. Masonite Corp.*, 316 U. S. 265, because it actually or potentially suppresses competing and non-infringing products not as a result of the preference of the public for the patented product but as a result of the preference of the manufacturers for a non-competitive market.

The combination charged in the price-fixing indictment violates the Sherman Act for three additional reasons. First, there has been pooling and suppression of patents for the purpose of eliminating price competition. *Standard Oil Co. v. United States*, 283 U. S. 163. Second, the patentee has bound itself to adhere to prices fixed according to a formula agreed upon with competitors and has conspired with certain licensees to protect them from competition by inducing

other competing manufacturers to take licenses upon terms securing to the conspirators control of the licensees' prices, thus unlawfully restraining trade in the patented product for the benefit of competitors. *Interstate Circuit v. United States*, 306 U. S. 208. Third, the appellees have unlawfully agreed to fix resale prices and to compel adherence by means of a boycott. *Eastern States Lumber Ass'n v. United States*, 234 U. S. 600.

The monopoly indictment.—The conduct charged in the indictment in No. 82 is the same as that described by the price-fixing indictment except that the allegations of price fixing are omitted. Manifestly, monopolies secured by the described means are unlawful under Section 2 of the Sherman Act unless they are within the scope of the Jauch patent. Here, the appellees have gone beyond legitimate exploitation of the patent monopoly for three reasons. First, a patentee goes beyond his monopoly when he enhances his trade position by a horizontal combination with potential competitors under which they market only the patented article and thereby add to the monopoly of the patented article the advantages of impairing and eliminating actual or potential competition in competing but non-infringing devices. Second, an agreement among competitors to combine patents for the purpose of creating a monopoly is within the prohibition of the Sherman Act. Third, whatever monopoly the issue of a patent

may confer upon the patentee, he may not lawfully restrain trade to enable other manufacturers to achieve a monopoly position.

None of the other patents in the field (except one) had been held to conflict with or infringe the Jauch patent, and it cannot be assumed, in the absence of an adjudication, that the Jauch patent is any more valid than the others or that non-infringing devices satisfying the public demand cannot be developed under the incentive of competition.

ARGUMENT

I

THE COURT HAS JURISDICTION OF THESE APPEALS UNDER THE CRIMINAL APPEALS ACT

On these appeals we invoke the jurisdiction of the Court under the Criminal Appeals Act,⁵ which permits the United States to appeal directly to this Court from a judgment of a district court sustaining a demurrer to an indictment where such decision "is based upon the * * * construction of the statute upon which the indictment * * * is founded." In our view the court below, construing the Sherman Act in relation to the patent laws, first held as a matter of substance that the indictments do not charge a crime within the meaning of the Sherman Act, and then simply

⁵ 18 U. S. C. 682, Judicial Code § 238, 28 U. S. C. 345. The relevant provisions are set out in full, pp. 3-4, *supra*.

went on to say that the indictments are defective as pleadings if they are intended to charge crimes within the Sherman Act as that Act is construed by the court below. We submit that two principles show that such a decision "is based upon" a construction of the Sherman Act, upon which the present indictments were founded. It follows that this Court has jurisdiction in the instant cases.

First. When a district court decides that an indictment does not charge an offense under the Sherman Act, an appeal will lie even though the district court interpreted the Sherman Act in the light of other statutes. *United States v. Borden Co.*, 308 U. S. 188, 194-195. In the instant case, therefore, it is immaterial that the district court considered that the acts charged were removed from the reach of the Sherman Act by the patent laws. Indeed, the appellees do not oppose jurisdiction on any such ground.

Second. Even though the district court may point out other faults in the indictment, a direct appeal will lie whenever the decision "is based upon" the interpretation of a statute and does not stand independently upon the other faults mentioned by the district court. The reason there is no jurisdiction when the judgment of the district court rests upon some *independent* ground not subject to review is that for the Court to construe the statute in such a case would be for it

to render an advisory opinion upon an abstract question, since it must in any event affirm the judgment. *United States v. Hastings*, 296 U. S. 188, 192-194. But this reason is inapplicable when, as here, the district court has held that an indictment as a matter of substance does not charge a crime within the meaning of a statute as construed by the court, and merely continues on to say that if the indictment is intended to charge a crime within the meaning of the statute as construed by the court, then it is defective as a pleading for want of specificity. In such a case the order of the district court cannot stand upon the second ground alone and must be reversed if that court's construction of the statute was erroneous. In such a case, therefore, the order necessarily "is based upon" a construction of the statute, and under the Criminal Appeals Act a direct appeal will lie.

Any other view would defeat the purpose of the Criminal Appeals Act. Every decision sustaining a demurrer to an indictment for failure to charge a crime within the meaning of the statute can be said in a loose sense to rest in part upon the additional conclusion that the indictment is a defective pleading if it is intended to make other charges which do constitute a crime. This additional conclusion may be left unsaid because no one has urged the contrary. Or, even though it is unnecessary, the judge may mention it be-

cause the defendants framed their pleadings and arguments in terms of a failure to plead with sufficient definiteness acts which they urged were essential elements of the crime. But this form of argument cannot hide the fundamental question whether the acts which are definitely charged in the indictment do in fact constitute a crime; and therefore, even when the court expresses the additional step in the reasoning in its opinion, it remains true that the first step is the essential one in the decision.

We submit, therefore, that it is plain that the Court has jurisdiction of these appeals. But if further support is needed it is provided by the analogy to decisions sustaining the jurisdiction of this Court upon appeals from state courts where it was contended that the decision rested upon a non-federal ground. The Court has repeatedly held (*Enterprise Irrig. Dist. v. Canal Co.*, 243 U. S. 157, 164):

* * * where the non-federal ground is so interwoven with the other as not to be an independent matter, *or is not of sufficient breadth to sustain the judgment without any decision of the other*, our jurisdiction is plain. * * * [Italics added.]

See also *Abie State Bank v. Bryan*, 282 U. S. 765, 773; *Brinkerhoff-Faris Co. v. Hill*, 281 U. S. 673, 682; cf. *Fox Film Corp. v. Muller*, 296 U. S. 207. The analogy is unusually persuasive in interpreting the Criminal Appeals Act because that statute was enacted in the light of those considera-

tions governing the exercise of judicial power which are exemplified by the decisions cited above. *United States v. Hastings*, 296 U. S. 188, 193-194.

In the instant case the appellees have opposed this Court's jurisdiction with the argument that the decision below rests exclusively, or if not exclusively then independently, upon the ground that the indictments are too indefinite to apprise them of the nature and cause of the accusations against them. As stated above, we read the opinion differently. In our view, the district judge accepted the clear and specific allegations of the indictments and held that they did not charge violations of the Sherman Act because the acts charged were within the scope of the patent monopoly; he then went on to say in several instances that, if the indictments were intended to charge acts outside what he considered to be the patent privilege, they did not do so with sufficient specificity. If our view is correct, the order plainly is based upon the first step in this reasoning and cannot stand unless the judge correctly determined the scope of the patent monopoly in relation to the Sherman Act, thus raising an appealable question. We shall show below, therefore, that we interpret the court's action correctly both insofar as it dealt with the indictments as a whole and as it dealt with the groups of subsidiary charges.

The indictments as a whole.—As set forth in our Statement, *supra*, the indictments charge conspiracies to regulate the computer pump industry

from manufacturer to consumer, and to monopolize commerce in computer pumps and computing mechanisms under the aegis of the Jauch patent, not by legitimate exploitation of a dominating patent⁶ but by combination under agreements among former and potential competitors binding them, *inter alia*: (a) to cease competition and accept licenses under the Jauch patent, to pool and suppress competing patents, and to induce other manufacturers to do likewise; (b) to use the Jauch patent to fix manufacturers' prices, including commissions and discounts; and (c) to fix jobbers' resale prices and boycott non-complying jobbers.

In the district court, as in this Court, the Government argued that taken as a whole these allegations charged conspiracies to fix prices and monopolize trade which went far beyond the scope

⁶ The indictments contain allegations proof of which would show that the appellees never looked upon the Jauch patent as dominating the field but used it simply as an attempted excuse for their price fixing and monopolistic purposes. For example, it is alleged that Wayne offered to sell the patent to Neptune if Neptune would administer the licenses thereunder on terms, including price control, established by Wayne (R. 15). The indictments also set forth that Tokheim recognized that the Jauch patent made "doubtful claims" (R. 14) but agreed to "a licensing arrangement to other companies only under terms that will admit of price control * * *" (R. 13). And the allegation that Wayne, G & B and Tokheim agreed to divide royalties and litigation expenses (R. 13) also shows that this is not a case of one company dominating the field by the strength of its patent position.

of the patent monopoly and were plainly violative of the Sherman Act. It referred particularly to *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, as a controlling precedent showing that the Jauch patent was not a sufficient justification for the otherwise admittedly unlawful combinations.⁷

The district court rejected the Government's argument not on the ground that the pleading was defective but on the ground that the argument was unsound. Preparatory to discussing the allegations of the indictments the court stated its view of the scope of the patent monopoly to be that a patentee has power to fix prices and grant licenses upon any terms he may choose (R. 34-36).⁸ It then cited *Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co.*, 154 Fed. 358 (C. C. A. 7), certiorari granted, 207 U. S. 589, dismissed per stipulation, 210 U. S. 439 to show that whatever the patentee could do alone, he could do with others in combination.⁹ Finally, the court dis-

⁷ See e. g. *United States v. Trenton Potteries Co.*, 273 U. S. 392; *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150; *National Cotton Oil Co. v. Texas*, 197 U. S. 115, 129; *Fashion Originators' Guild v. Federal Trade Commission*, 312 U. S. 457, 465-468.

⁸ The cases relied upon by the District Court were *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U. S. 405; *Bement v. National Harrow Co.*, 186 U. S. 70; *United States v. General Electric Co.*, 272 U. S. 476; *Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co.*, 154 Fed. 358 (C. C. A. 7), certiorari granted, 207 U. S. 589, dismissed per stipulation, 210 U. S. 439.

⁹ The *Rubber Tire* case has been substantially repudiated by the court which decided it. See *American Equipment Co.*

tinguished the *Standard Sanitary* case on the ground that it involved a process and not a product patent, and held that the only limitation upon the power of a patentee, acting alone or in combination with others, is that "he may not use his patent as a pretext for fixing prices on an unpatented article of commerce; nor fix the resale price on his patented article; nor make use of tying clauses" (R. 37).

This interpretation of the Sherman Act brought the court to the focal point of the case; it then ruled (R. 37-38):

The things and means * * * set out are things which I believe the patentee, under its patent already had the right to do.

And, after discussing a number of the specific charges (see pp. 28-35, *infra*), the court concluded (R. 42):

I have read the indictments in their entirety several times, and in the various means, acts and devices whereby the combinations and conspiracies are alleged to have been accomplished, I do not find that defendants are charged with the doing of anything which they did not already have the right, under the patent, to do. The

v. Tuthill Bldg. Material Co., 69 F. (2d) 406, 409 (C. C. A. 7). Likewise, it is in direct conflict with later decisions of this Court. *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20; *Interstate Circuit v. United States*, 306 U. S. 208; *United States v. Masonite Corp.*, 316 U. S. 263.

fixing of prices and monopoly to manufacture and sell computer pumps, here complained of, were the very rights which the Wayne Company and its licensees enjoyed by reason of ownership of the patent. * * *

*Having in mind that the subject matter of the instant indictments is protected by a patent, I am of the opinion that the defendants here have not been furnished with such definite and particular allegations of fact as will meet this test [of certainty]. * * * [Italics added.]*

We submit, therefore, that there can be no doubt that the decision is based upon a construction of the Sherman Act in relation to the patent laws. The structure of the whole opinion makes it apparent that the district court decided that "the things and means * * * set out are things which I believe the patentee * * * had the right to do" and that the court simply went on to say—"having in mind that the subject matter * * * is protected by a patent"—that if any other charges were intended, they were not set out with sufficient definiteness and certainty.¹⁰

¹⁰ That the language in the opinion on definiteness goes only to the possibility that the indictments were intended to charge other acts in addition to those held by the judge to be within the patent monopoly is shown clearly by the following quotation (R. 38) upon which the appellees relied in their Statement Opposing Jurisdiction (p. 11):

The difficulty is that the Government fails to set out any identifying facts to show that the Wayne Pump Company and its licensees did *anything more than the law*

Use of licenses and pooling and suppression of patents in order to fix prices and monopolize trade.—One of the principal groups of allegations in the indictments charges that with the purpose and effect of fixing prices (No. 81) and monopolizing trade (No. 82) the appellees agreed that G & B and Tokheim would acknowledge the validity of and accept licenses under Wayne's Jauch patent and surrender control of their patents to Wayne. Other manufacturers likewise were to be induced to accept such licenses upon terms acknowledging the validity of the Jauch patent and securing to Wayne control of the licensees' patents. Also, Wayne would compel Neptune, Veeder's only competitor, to submit its patents to uses determined by Wayne and to acknowledge the validity of the Jauch patent, to refrain from manufacturing computing mechanisms except with the approval of Wayne, and to sell computing mechanisms only to customers

permitted them to do under the monopoly granted by the patent. How they took joint action or entered into joint agreements to use the Jauch patent to achieve the alleged illegal objectives, or how they went outside the monopoly granted to the patentee and its licensees, is nowhere set out in the indictments. [Italics added.]

This statement follows immediately after the holding that "the things and means * * * set out are things which I believe the patentee, under its patent already had the right to do". The sequence is convincing that the discussion of the alleged indefiniteness is only supplemental to the issue whether the patentee had a right to do the things set out in the indictment.

approved by Wayne, G & B and Tokheim. A number of decisions appeared to show that such licensing and pooling and suppression of patents for the purpose of fixing prices or achieving a monopoly is a plain violation of the Sherman Act. (See pp. 45-48 *infra*.) The district court, however, rejected this interpretation of the Act and took the view that the conduct was lawful because the Jauch patent dominated the field. The court said (R. 38):

it is not clear what is meant by the allegation that defendants attempted to compel Neptune to submit all patents owned or controlled by it on computer pumps "to uses determined by Wayne".

The court then explained that it was not clear that any crime was charged by this allegation because "with the issuing of the Jauch patent the Wayne Company dominated the computer pump field" (R. 38) and in support of that conclusion it referred to the decision of Judge Slick in the Neptune litigation holding the Jauch patent valid and infringed. The court then made it apparent that its holding in this regard was an interpretation of the Sherman Act, saying (R. 39-40):

Under these conditions I fail to see how defendants aided in carrying out an unlawful conspiracy because defendant Wayne Company, with the consent of G. & B. and Tokheim, approached gasoline pump manufacturers, who had purchased computer mechanisms from Neptune and other man-

ufacturers, and attempted to induce them to accept licenses under the Jauch patent. * * *

The indictment also charges as one of the means or devices used in bringing about the combination or conspiracy that "the defendants Veeder, G. & B. and Tokheim acknowledge the validity of the Jauch patent." When G. & B. became licensees they were estopped from denying the validity of their licensor's patent, and I see nothing illegal or unlawful in the licensor requiring of them that they acknowledge the validity thereof, especially, as here, where its validity had already been established by the United States District Court of Indiana. * * *

As the appellees point out, the court also said that if improper means were used either in securing the acknowledgments of the validity of the Jauch patent (R. 39-40) or in persuading manufacturers to accept licenses, such means should have been charged (R. 39). But plainly those remarks, which are three of the ten passages relied on by the appellees,¹¹ do not constitute a wholly

¹¹ The three passages are quoted at pages 10-11 of the Statement Opposing Jurisdiction. It was also in this connection that the court commented upon the failure of the indictment to list the patents competing with the Jauch patent (R. 41). It is apparent from the context out of which the appellees have excerpted this comment (R. 42) that the court did not hold the indictments invalid on this ground, which could easily be remedied by a motion for a bill of particulars if the appellees need such information to prepare their defense.

independent ground on which the orders sustaining the demurrers will rest. On the Government's view of the cases the presence or absence of such misconduct was immaterial. Those remarks, therefore, are plainly intended merely to supplement the court's ruling on the scope of the patent monopoly by pointing out that the indictments do not charge the kind of conduct which it considered a violation of the Sherman Act.

*Use of the Jauch patent to fix manufacturers' prices.*¹²—The manner in which the court dealt with these subsidiary charges also shows that we interpret his ruling correctly. The price-fixing indictment charges that Wayne, G & B, and Tokheim agreed upon a formula for determining the prices for computer pumps to which all three were to adhere, and that they also fixed and adhered to other terms and conditions of sale, including discounts and salesmen's commissions. Likewise, other manufacturers were to be made to adhere to prices determined by Wayne, G & B and Tokheim through a series of license agreements securing to them control of the licensees' prices. The Government argued that these agreements were in violation of the Sherman Act under well-settled principles. (See pp. 38-50 *infra*.) The district court held, however (R. 37):

¹² The allegations concerning fixing of manufacturers' prices appear only in the price-fixing indictment. The monopoly indictment, therefore, was not subject to attack on the ground that these allegations are too indefinite.

There is no charge that defendants fixed the prices of gasoline pumps generally, or restricted their manufacture and sale. They are charged only with fixing the prices of computer pumps, a right which the Wayne Pump Company already had under the statutory monopoly granted by the Government when its patent was issued. * * *

Plainly, this was a ruling that the specific allegations did not as a matter of substance charge a crime. A few sentences later the court observed (R. 37):

What is meant by the phrase "used the Jauch patent" is not quite clear. * * * if the Government claims that these defendants were involved in some offense under the Sherman Act other than the exercise of a patent monopoly, then such offense should be set out clearly in the indictments.

But this observation does not suggest that the charges made are void for uncertainty; it simply points out that nothing more is charged than what the court holds to be protected by the patent monopoly, thus emphasizing again that the basis of the decision is the ruling upon the scope of the patent monopoly in relation to the Sherman Act.

Agreement to fix jobbers' resale prices.—The price-fixing indictment¹³ charges that the ap-

¹³ The allegations concerning fixing of resale prices appear only in the price-fixing indictment. The monopoly indictment, therefore, was not subject to attack on the ground that these allegations are too indefinite.

pellees agreed (R. 12):

that the said defendants determine jobbers' resale prices for computer pumps, refuse to sell computer pumps to any jobber failing or refusing to adhere to such resale prices, and eliminate discounts to all jobbers in the event of a general failure by jobbers to adhere to the said resale prices * * *

In considering these allegations the court declared (R. 40):

no facts are set out to show that the Wayne computer pumps were sold through jobbers, nor are the names of any specific jobbers given with whom these defendants carried on negotiations wherein the resale price of computing pumps was determined. * * *

And further the court said (R. 41):

If this condition does exist, surely the Government must be in possession of the facts, and they should be set out in the indictments, so as to reasonably inform defendants of the offense with which they are charged.

In their Statement Opposing Jurisdiction (p. 11) appellees place great weight on these two excerpts. We submit, however, that like its other subsidiary rulings the court's disposition of the resale price-fixing aspect of the conspiracy rests basically upon a misconstruction of the Sherman Act.

It seems obvious that the quoted allegations were clear as far as they went. They charge an agreement among the appellee manufacturers upon resale prices and a further agreement to boycott jobbers who do not adhere to those prices. They raise the issue whether the joint action of manufacturers in fixing resale prices, the joint refusal of manufacturers to deal with price-cutting jobbers, and the joint elimination by manufacturers of jobbers' discounts is an unlawful restraint of trade under the Sherman Act, when it is part of a horizontal agreement among the manufacturers to eliminate all price competition by fixing both manufacturers' selling prices and jobbers' resale prices. The district court apparently believed, however, that to charge a violation of the Sherman Act it was necessary to allege that there were negotiations and actual agreements with the jobbers fixing the resale prices. It could only have been on this assumption that the district court stated that the indictment should have alleged actual agreements with the jobbers and named the specific jobbers who were parties to the arrangement.

The holding of the district court, therefore, is not simply that the resale price-fixing allegations of the indictment were too general. The holding is that the price-fixing and boycott agreement charged is not itself unlawful. It is true that the court nowhere says this expressly, but the de-

cision in this respect must be based either upon that unexpressed conclusion, or else upon the failure of the court to consider whether the Sherman Act condemns such an agreement to fix resale prices and to boycott non-complying jobbers. In either event, the ruling is based upon a construction of the Sherman Act and an appeal will lie, for a failure to consider the application of the Act is itself a construction of the Act. *United States v. Nixon*, 235 U. S. 231; *United States v. Malphurs*, 316 U. S. 1.

In their Statement Opposing Jurisdiction appellees have listed a number of points in the opinion at which the district judge referred to a lack of specificity in the allegations. We have dealt with all but one of these passages above¹⁴ and have shown, we submit, that at the most they go no farther than to say that the indictments do not charge with sufficient definiteness anything which the district court considered to be a violation of the Sherman Act. The other passage, with which we have not heretofore dealt, in its context is as follows (R. 37-38):

In the case of *United States v. Standard Sanitary Manufacturing Co.*, 226 U. S. 20, the patent owner and its licensees entered into a scheme for fixing prices on a common article of commerce—unpatented bath tubs—and then by a pretended use of a process patent attempted to evade the Sherman

¹⁴ See pp. 27, 29, 30, 32, 33-34, *supra*.

Act. This is obviously not the instant case, and the indictments do not allege that there was any understanding or agreement among the defendants to use the patent to fix prices on any unpatented article. In fact there is no allegation that there was any understanding or agreement among the defendants at all, aside from the allegation that they "knowingly have entered into and engaged in a combination and conspiracy to fix and maintain noncompetitive prices and to monopolize the manufacture and sale of computer pumps and computing mechanisms, by the doing of the things set out." The things and means then set out are things which I believe the patentee, under its patent already, had the right to do.

We set this quotation out at length because merely to read the next to the last sentence in its context shows how utterly it fails to support the appellees' contention (Statement Opposing Jurisdiction, pp. 12-13) that the district court decided the case on the ground that no conspiracy was charged in the indictments. On the contrary, this passage illustrates again the reasoning of the district court on all the issues: the court held that the acts charged were lawful and simply said that "aside from" those allegations no misconduct was alleged.

We submit, therefore, that the decision below was bottomed on an interpretation of the Sherman Act. If the district court construed it erroneously, the orders sustaining the demurrers cannot stand.

This would be admitted, we think, if the judge had expressly stated at the outset what acts he considered to have been specifically charged by the indictments, and what charges he could not consider to have been made, and if he had then held that the acts charged did not constitute a crime. The fact that he reversed the sequence of thought and decided, first, whether the specific charges were unlawful and, second, whether anything more was charged, should not be allowed to conceal the essential character of the ruling. The decision "is based upon" an interpretation of the Sherman Act and, therefore, under the two principles stated at the outset an appeal will lie.

There is a broader ground, moreover, upon which the jurisdiction of this Court to decide the substantive question will rest. The principles determining the jurisdiction of this Court under the Criminal Appeals Act have been developed by analogy to cases arising on writs of error or appeals from judgments of state courts. *United States v. Hastings*, 296 U. S. 188, 193-194. In such cases this Court will decide the federal question if the non-federal grounds put forward are without any fair or substantial support. *Ward v. Love County*, 253 U. S. 17, 22. *Lawrence v. State Tax Comm.*, 286 U. S. 276, 282-283; *Utley v. St. Petersburg*, 292 U. S. 106, 112; *Fox Film Corp. v. Muller*, 296 U. S. 207, 209. We submit that the analogy is apposite here. No argument

is needed to show that the indictments fairly apprise the appellees of the nature and cause of the charges against them; the conspiracies are described with unusual specificity and detail; the suggestion that both indictments are void in their entirety for indefiniteness is utterly lacking in merit. Regardless of the grounds of the decision below, therefore, this Court has jurisdiction to determine whether the indictments charge violations of the Sherman Act.

II

THE COMBINATIONS AND CONSPIRACIES CHARGED IN THE INDICTMENTS ARE UNLAWFUL UNDER THE SHERMAN ACT

A. THE PRICE-FIXING INDICTMENT

As we have shown in our Statement, pages 4-12, *supra*, the price-fixing indictment charges a combination among the dominant manufacturers in an industry to use a patent as the fulcrum of a series of arrangements, both among themselves and with others, in order to eliminate all price competition in the sale of computer pumps. Competition between Wayne, G & B and Tokheim was to be eliminated by G & B and Tokheim turning over their patents to Wayne, acknowledging the validity of the Jauch patent, accepting licenses thereunder, and agreeing with Wayne upon selling prices. Competition between those three and all

other manufacturers of computer pumps was to be prevented by obtaining control of all other patents on such pumps and by inducing all other manufacturers in the field to accept licenses under the Jauch patent upon terms acknowledging its validity and securing to Wayne control of the licensees' patents and to Wayne, G & B and Tokheim control of the licensees' prices. The appellee Veeder was to assist by turning over to Wayne patents owned or acquired by it on computing mechanisms and by selling computing mechanisms only to purchasers approved by Wayne, G & B and Tokheim who, in return, were to purchase computing mechanisms only from Veeder. Neptune, Veeder's sole competitor in the manufacture and sale of computing mechanisms, was to be compelled to accept a license under the Jauch patent, to surrender control of its patents, to manufacture computing mechanisms only with the approval of Wayne, and to sell such mechanisms only to purchasers approved by Wayne, G & B and Tokheim. Even competition among jobbers was to be eliminated by fixing jobbers' resale prices, boycotting non-complying jobbers, and eliminating jobbers' discounts in the event of a general failure to adhere to the resale prices. The Jauch patent was not dominating either because its basic character had been established by litigation or because the public insisted upon pumps made under it; it was the facade of the combination. (See pp. 7-10, *supra*.)

The objective to eliminate all price competition in the sale of computer pumps was accomplished. All patents capable of competing with the Jauch patent were brought under the control of the conspirators; the validity of that patent was acknowledged by all manufacturers in the field; and all manufacturers were licensed thereunder. The appellees by agreement controlled not only their own prices but also the prices of all other manufacturers. And they sought to control jobbers' prices until 1938 when, by agreement, they stopped all manufacturers from giving discounts to jobbers with the result that jobbers no longer share in the distribution of computer pumps. (See pp. 11-12, *supra*.)

We submit that this conspiracy "transcended what was necessary to protect the use of the patent or the monopoly which the law conferred upon it" and "passed to the purpose and accomplished a restraint of trade condemned by the Sherman law" as clearly as did the combination held unlawful by this Court in *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, 48. In that case, manufacturers of 85 percent of the enameled iron ware sold in the United States, who had formerly been competitors, accepted licenses under a patent for an improved method of enameling iron ware. The licensor (who was not a manufacturer, but the promoter of the scheme) had also acquired control of the competing patents. He and five

representatives elected by the manufacturer licensees fixed prices to which all the licensees adhered. Jobbers' resale prices also were fixed, and the members of the combination were to boycott jobbers who would not execute resale price agreements. This Court held that the combination was not protected by the patent privilege and violated the Sherman Act.

The single feature distinguishing that case from the instant case, except as this is more extreme, is that there a process patent was involved while the Jauch patent covers a product. The court below found the case inapplicable for this reason, but obviously it was in error. For this Court expressly stated in the *Standard Sanitary* case (p. 49) that it reached its decision "without entering into the consideration of the distinction * * * between a patented article and a patented tool used in the manufacture of an unpatented article."

The district court also intimated that the *Standard Sanitary* case was distinguishable because it involved a deliberate, preconceived attempt to evade the Sherman Act (R. 37). But assuming that characterization of the *Standard Sanitary* case to be accurate, nevertheless the case is strictly in point. In the instant case the indictment in its entirety is based on the theory of a conspiracy to eliminate competition, with the Jauch patent being used simply as a means subservient to that end.

In addition to the general charge of a conspiracy to fix prices, the indictment alleges that the appellees agreed to "use the Jauch patent . . . for the purpose of fixing prices" (R. 11), thereby specifically charging that appellees had the pre-conceived intention to use the patent to accomplish a purpose forbidden by law. The indictment contains other specific allegations showing this to be true. It is alleged, for example, that Wayne with the consent of G & B and Tokheim offered Neptune a license in 1935 upon condition that Neptune turn over its patents to uses determined by Wayne, and that when this offer was rejected Wayne offered to transfer the Jauch patent to Neptune upon condition that Neptune administer the price-fixing arrangement (R. 14-15). The indictment also charges that Wayne agreed to share royalties and litigation expenses with G & B and Tokheim (R. 13). Neither the making of this agreement nor the negotiations with Neptune is the conduct of a manufacturer dominating the field by the strength of his patent position. Both show, if such proof be necessary, that the combination treated the Jauch patent as a device to circumvent the positive prohibitions of the Sherman Act.

But whatever the rationale of the *Standard Sanitary* case, it is now clear that a combination such as that charged in the present indictment is *per se* a violation of the Sherman Act, regardless of whether the combination was deliberately

devised for unlawful purposes. *United States v. Masonite Corp.*, 316 U. S. 265. The basic wrong to the public is that competing manufacturers, unwilling to risk price competition, have by common consent taken shelter, and induced others to take shelter, under a patent. Mr. Justice Douglas, speaking for the Court in *United States v. Masonite Corp.*, 316 U. S. 265, 281, explained the reasons as follows:

The power of Masonite to fix the price of the product which it manufactures, and which the entire group sells and with respect to which all have been and are now actual or potential competitors, is a powerful inducement to abandon competition.

* * * Active and vigorous competition then tends to be impaired, not from any preference of the public for the patented product, but from the preference of the competitors for a mutual arrangement for price-fixing which promises more profit if the parties abandon rather than maintain competition. The presence of competing patents serves merely to accentuate that tendency and to underline the potency of the forces at work. Control over prices thus becomes an actual or potential brake on competition. This kind of marketing device thus, actually or potentially, throttles or suppresses competing and non-infringing products and tends to place a premium on the abandonment of competition. It is outside our competence to inquire whether the

result was or was not *beneficent*, or whether the evil was or was not realized. * * *

The power of this type of combination to inflict the kind of public injury which the Sherman Act condemns renders it illegal *per se*. * * *

The superficial difference that licenses to vend were involved in the *Masonite* case, whereas here the licenses are to manufacture, use and sell, will not serve as a distinction. The purposes and results of the conspiracy charged are the same as those denounced in the *Masonite* case. The appellees and all manufacturers licensed under the Jauch patent have been competitors, and would be now but for the conspiracy. All competing patents have been subjected to the control of Wayne, and the validity of the Jauch patent has been acknowledged by the manufacturers in the field. And here, as in the *Masonite* case, the horizontal combination among manufacturers has fixed uniform prices to which all the manufacturers, including the patentee, are bound to adhere. This combination: "actually or potentially, throttles or suppresses competing and non-infringing products and tends to place a premium on the abandonment of competition," and, therefore, is illegal *per se*.

The considerations showing the combination charged in the indictment to be illegal *per se* also serve to distinguish the instant case from *Bement v. National Harrow Co.*, 186 U. S. 70, and *United*

States v. General Electric Co., 272 U. S. 476. As those cases came before the Court they presented the question whether a patentee may issue a single license which binds the licensee to adhere to prices fixed by the patentee. (See 186 U. S. at 83-85 and 272 U. S. at 488.) In each case, the Court thought that the purpose and effect of the plan was to secure the patentee only a reward for his invention. But, in the instant case, the indictment charges mutual agreement among all the dominating manufacturers for the purpose and with the effect of fixing prices and eliminating competition; the combination therefore does not simply secure the patentee a reward for the invention but it unlawfully protects the patentee's position and the position of its former competitors against any effective price competition. See *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, 49; *United States v. Masonite Corp.*, 316 U. S. 265, 281-283.

Since the indictments clearly charge a conspiracy which is unlawful *per se* under the principles stated in the *Standard Sanitary* and *Masonite* cases, it is unnecessary to discuss at length the other respects in which the alleged conspiracy would restrain trade unlawfully. We shall show briefly, however, that there are at least three other reasons for holding that the indictment charges a violation of the Act. Each of them serves as an additional ground for distinguishing the *General Electric* and *Bement* cases.

1. *The indictment charges an unlawful conspiracy to pool, and suppress competition under, competing patents for the purpose of eliminating price competition.*—According to the indictment, it was part of the conspiracy that G & B, Tokheim, and Veeder place their patents under the control of Wayne and acknowledge the validity of the Jauch patent, and that G & B and Tokheim be licensed under that patent. Furthermore, the appellees were to induce all other manufacturers having patents to accept licenses under the Jauch patent, to acknowledge the validity of the Jauch patent, and to turn all their patents over to the control of Wayne. Neptune was to be compelled to acknowledge the validity of the Jauch patent, to cease manufacturing computing mechanisms except with the approval of Wayne, and to submit its patents to uses determined by Wayne. The indictment alleges that the purpose of these activities was to enable the appellees to fix prices. (R. 11-13.)

It is settled that such conduct violates the Sherman Act. This Court some time ago announced the principle that an agreement to combine patents for the purpose of effecting a monopoly or fixing prices is an unlawful restraint of trade. See *Standard Oil Co. v. United States*, 283 U. S. 163, 174-175. And numerous lower federal courts have applied the same rule. *Lynch v. Magnavox Co.*, 94 F. (2d) 883 (C. C. A. 9); *National Harrow Co. v. Hench*, 76 Fed. 667 (C. C.,

E. D. Pa. 1896), affirmed, 83 Fed. 36 (C. C. A. 3); *National Harrow Co. v. Quick*, 67 Fed. 130 (C. C. Ind. 1895), affirmed, 74 Fed. 236 (C. C. A. 7); *Blount Mfg. Co. v. Yale & Towne Mfg. Co.*, 166 Fed. 555 (C. C. Mass. 1909); *United States v. New Departure Mfg. Co.*, 204 Fed. 107 (W. D. N. Y.); *United States v. Motion Picture Patents Co.*, 225 Fed. 800 (E. D. Pa.)

The court below in holding this conduct lawful relied upon the fact that the Jauch patent had been held valid and infringed by the Neptune computing mechanism. But this circumstance is unimportant. None of the other patents had ever been held invalid or to infringe the Jauch patent. Consequently, the court below was not warranted in assuming that the Jauch patent was any more valid than the others issued by the Patent Office. See *United States v. Masonite Corp.*, 316 U. S. 265, 280. The Jauch patent did not dominate the field by virtue of adjudication. It dominated by agreement only.¹³

Moreover, the indictment makes it clear that the filing and settlement of the Neptune suit, and the negotiations leading up to it, were all a part of the conspiracy and were done in furtherance of its objectives. The indictment alleges that in 1935 Wayne, with the consent of G & B and Tok-

¹³ It is significant on this aspect of the case that at least one of the officers of Tokheim recognized the "doubtful claims" of the Jauch patent and that the company therefore consented to the licensing of other companies "only under terms that will admit of price control" (R. 13-14).

heim, offered Neptune a license upon the condition that Neptune acknowledge the validity of the Jauch patent and turn over its patents to uses determined by Wayne. When Neptune refused this offer, Wayne offered to sell the Jauch patent to Neptune on condition that Neptune administer the licenses issued under the Jauch patent on terms established by Wayne. It was only upon the refusal of this second offer that Wayne, with the approval of G & B and Tokheim, instituted the infringement suit involving Neptune's computing mechanism. The litigation was never carried beyond the district court. Wayne and Neptune entered into a settlement by which it was agreed, among other things, that Neptune should acknowledge the validity of the Jauch patent in perpetuity; that the use of all patents for computing mechanisms owned, or thereafter acquired, by Neptune should be determined by Wayne, that Neptune should refrain from manufacturing any computing mechanisms except with the approval of Wayne, and that Neptune should sell only to customers approved by Wayne, G & B, and Tokheim. (R. 14-15.) It is obvious, of course, that the settlement went far beyond a mere composition of the matters in suit, and combined patents in violation of the Sherman Act. *Standard Oil Co. v. United States*, *supra*; *National Harrow Co. v. Hench*, 83 Fed. 36, 38 (C. C. A. 3).

2. *The indictment charges an unlawful conspiracy to use the Jauch patent to fix manufacturers'*

prices by joint action for the benefit of the patentee's former competitors.—The indictment alleges specifically that in accordance with the conspiracy Wayne, G & B and Tokheim were to agree upon a formula for determining manufacturers' prices and were to determine jointly other terms and conditions of sale; all three were to observe the prices, terms and conditions of sale thus determined, Wayne no less than the others. Likewise, it charges that Wayne, when G & B and Tokheim consented, was to induce other manufacturers to take licenses securing control of their prices to Wayne, G & B and Tokheim; and Wayne, G & B and Tokheim were to share both the royalties from the licenses and the litigation expenses incurred in enforcing them. • (R. 12-13.)

This then is not a case where the patentee by independent action has fixed the selling prices of his licensees for the purpose of protecting his monopoly and the pecuniary reward therefrom. This is a case of joint action among the three chief manufacturers of computer pumps directed to the end of protecting each other from competition. The patent was used merely as a means to this end; the licensees, G & B and Tokheim, had a voice in fixing the prices and Wayne, the patentee, bound itself to adhere to the prices fixed by agreement.

We submit that such an agreement violates the Sherman Act. A patent cannot be used to protect

from competition parties having no interest in the patent. *Interstate Circuit v. United States*, 306 U. S. 208; *United States v. Masonite Corp.*, 316 U. S. 265, 282. In the *Interstate* case the Court held (p. 230):

A contract between a copyright owner and one who has no copyright, restraining the competitive distribution of the copyrighted articles in the open market in order to protect the latter from the competition, can no more be valid than a like agreement between two copyright owners or patentees. [Citing cases.] In either case if the contract is effective, as it was here, competition is suppressed and the possibility of its resumption precluded by force of the contract. An agreement illegal because it suppresses competition is not any less so because the competitive article is copyrighted. The fact that the restraint is made easier or more effective by making the copyright subservient to the contract does not relieve it of illegality. * * *

It would seem to follow that a patentee may not surrender control over his prices to a competitor. Nor may he conspire with certain licensees to protect them from competition by inducing other competing manufacturers, selected by the conspirators jointly, to take licenses upon terms securing to the conspirators joint control of the licensees' prices.

3. *The indictment charges an unlawful conspiracy to fix resale prices.*—The indictment

charges that Wayne, G & B, and Tokheim agreed to fix resale prices for computer pumps and that they agreed to maintain those resale prices by a joint refusal to deal with price-cutting jobbers, by joint elimination of jobbers' discounts, and by the assistance of the Association in persuading jobbers to adhere to the resale prices agreed upon by these manufacturers (R. 12).

It is plain that these allegations charge an unlawful agreement to fix resale prices and to boycott non-adhering jobbers. The Jauch patent gave Wayne no right to fix the price at which computer pumps should be sold after they had passed out of the hands of Wayne and its licensees. *Ethyl Gasoline Corp. v. United States*, 309 U. S. 436. *A fortiori* it was unlawful for appellees to fix resale prices by an organized boycott of non-complying jobbers. *Montague & Co. v. Lowry*, 193 U. S. 38; *Eastern States Lumber Ass'n v. United States*, 234 U. S. 600; *Fashion Originators' Guild v. Federal Trade Commission*, 312 U. S. 457. Since the basic unlawfulness of the acts charged inheres in the agreement among manufacturers to fix resale prices and to boycott jobbers who do not conform, and not in a vertical combination between a manufacturer and his distributors, the case of *United States v. Colgate & Co.*, 253 Fed. 522; affirmed, 250 U. S. 300, cited by the district court, is not in point. The acts and agreements charged are unlawful without any agreements with particular jobbers, because the ap-

pellees acted jointly to fix resale prices and to persuade and coerce jobbers to observe those prices.

B. THE MONOPOLY INDICTMENT

This indictment, we submit, alleges in clear and unmistakable terms unlawful conspiracies to monopolize the manufacture and sale of computer pumps (Count one) and the manufacture and ~~production~~^{sale} of computing mechanisms (Count two). Both of these counts contain allegations which are substantially the same as those in the price-fixing indictment, except that the charges of price fixing are omitted.

The manner in which the appellees conspired to accomplish their objectives is fully set out in the indictment. Prior to the execution of the conspiracies, the appellees and the other manufacturers in the field produced and sold computer pumps in competition with each other. Some of them produced computing mechanisms for use in their pumps and others bought such mechanisms. Also, prior to the execution of the conspiracies Neptune was engaged in manufacturing and selling computing mechanisms in competition with Veeder. (No. 82, R. 7-9.)

Under the terms of the conspiracies, however, G. & B. Tokheim, and Veeder were to place their patents on both computer pumps and computing mechanisms under the control of Wayne, accept licenses under the Jauch patent, and acknowledge

the validity of that patent. Wayne, G & B, and Tokheim agreed to purchase computing mechanisms only from Veeder and Veeder agreed to sell only to them and to other manufacturers approved by them (No. 82, R. 10.)

Next, Wayne, with the consent of G & B and Tokheim, was to induce all other manufacturers of computer pumps to accept licenses under the Jauch patent, acknowledge its validity, and turn over all their patents to the control of Wayne. Wayne was to license no one, however, except with the consent of G & B and Tokheim. In addition, Neptune was to be compelled to submit all patents owned or thereafter acquired to Wayne's control, acknowledge the validity of the Jauch patent, and refrain from manufacturing computing mechanisms except with the approval of Wayne. (No. 82, R. 11.)

The effects of these activities are also alleged in the indictment. In the computer pump field, all patents were placed under the control of Wayne, which was acting in collaboration with the other appellees; and all manufacturers were licensed under the Jauch patent. Thus, the appellees completely dominated and controlled the manufacture and sale, including the selling prices, of all computer pumps sold in the United States. And since 1937, when Wayne succeeded in securing control of Neptune's patents, the appellees have refused to license anyone else under the Jauch patent. (No. 82, R. 14.)

In the field of computing mechanisms, Neptune, who had been the sole competitor of Veeder in the manufacture and sale of such mechanisms to manufacturers of computer pumps, has been eliminated. Since 1938 Veeder has been the sole manufacturer of computing mechanisms in the United States. And Veeder by agreement has refused to sell to anyone except Wayne, G & B, and Tokheim, and other manufacturers licensed under the Jauch patent. (No. 82, R. 9-10.)

It is plain, therefore, that the indictment alleges conspiracies to monopolize the manufacture and sale of both computer pumps and computing mechanisms, which violate Section 2 of the Sherman Act, unless they are exempt from that Act by reason of the Jauch patent. *National Cotton Oil Co. v. Texas*, 197 U. S. 115, 129; *Standard Oil Co. v. United States*, 221 U. S. 1, 51-62, 70-77; *Fashion Originators' Guild v. Federal Trade Commission*, 312 U. S. 457, 465-468.

The district court did not hold otherwise; it justified the combinations only on the ground that they came within the patent privilege. We submit, however, that the monopolies which the appellees sought to and did secure went far beyond the monopoly granted by the Jauch patent. We have stated the reasons in discussing the price-fixing indictment. First, a patentee goes beyond his monopoly when he enhances his trade position by a horizontal combination with potential competitors under which they market only the pat-

ented article and thereby add to the monopoly of the patented article the advantages of impairing and eliminating actual or potential competition in competing but non-infringing devices. (See pp. 42-45, *supra*.) Second, as this Court expressly stated in *Standard Oil Co. v. United States*, 283 U. S. 163, 174-175, an agreement among competitors to combine patents for the purpose of creating a monopoly or fixing prices is within the prohibition of the Sherman Act. The same principle has been applied in numerous decisions in lower federal courts. See cases cited, pp. 46-47, *supra*. Third, whatever monopoly the issue of a patent may confer upon the patentee, he may not lawfully restrain trade to enable another manufacturer to achieve a monopoly position. (See pp. 48-50, *supra*.)

The lower court in holding the conspiracies lawful apparently relied entirely upon the fact that the Jauch patent had been held valid and infringed by a district court in a single infringement proceeding brought by Wayne involving Neptune's computing mechanisms. From this decision the court concluded that the Jauch patent dominated the field, that all manufacturers of computer pumps or computing mechanisms would be infringers, and that it was therefore lawful for the appellees to combine for the purposes set forth in the indictment. But none of the other patents in the field had been held to conflict with or infringe

the Jauch patent and it cannot be assumed, in the absence of an adjudication, that one patent is any more valid than another or that non-infringing devices satisfying the public demand cannot be developed under the incentive of competition. *United States v. Masonite Corp.*, 316 U. S. 265, 280-282. Even as regards the Neptune device in suit, moreover, the filing and settlement of the infringement suit, and the negotiations preceding it, were all charged in the indictment to be a part of the conspiracies and were performed for the purpose of effectuating their objects. See pp. 47-48, *supra*.

CONCLUSION

It is respectfully submitted that this Court has jurisdiction of these appeals and that the judgments from which the appeals were taken should be reversed.

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OCTOBER 1942.

FILE COPY
APR 24
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

Nos. 1171-1172 81-82

THE UNITED STATES OF AMERICA,

vs.

Appellants,

THE WAYNE PUMP COMPANY, ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS.

STATEMENT OPPOSING JURISDICTION AND
MOTION TO DISMISS.

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**IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION**

INDICTMENT No. 32597.

UNITED STATES OF AMERICA

vs.

THE WAYNE PUMP COMPANY, ET AL.

INDICTMENT No. 32598.

UNITED STATES OF AMERICA

vs.

THE WAYNE PUMP COMPANY, ET AL.

**STATEMENT OF APPELLEES AS TO THE JURISDICTION
OF THE SUPREME COURT TO REVIEW THE
JUDGMENTS OF THE DISTRICT COURT ENTERED
FEBRUARY 24, 1942.**

I. Preliminary.

In compliance with Rule 12(3) of the Rules of the Supreme Court of the United States, appellees submit herewith their statement disclosing the grounds upon which they contend, that the judgments of the District Court sustaining appellees' demurrers to the above indictments

are not reviewable by the Supreme Court under the Criminal Appeals Act, as amended (18 U. S. C. § 682; 28 U. S. C. § 345).

Inasmuch as the District Court disposed of both indictments in one opinion, appellees are filing the same statement as to jurisdiction in each case.

II. The Indictments.

In view of the detailed construction and analysis of the indictments contained in the District Court's opinion, which is conclusive for present purposes, and to which reference is hereby made, no useful purpose would be served by an extended paraphrase of the indictments.

In Indictment No. 32597, appellees were charged with combining and conspiring "to fix, maintain and control arbitrary, artificial and non-competitive prices for the sale of computer pumps" in violation of Section 1 of the Sherman Act.

In Indictment No. 32598, appellees (except the Gasoline Pump Manufacturers Association and G. Denny Moore, its Secretary, not parties to such indictment) were charged with combining and conspiring to monopolize the manufacture and sale of computer pumps (count 1) and computing mechanisms (count 2) in violation of Section 2 of the Sherman Act.

Both computer pumps and computing mechanisms are covered by patents issued by the United States, the former being covered by the Jauch patent (the only patent identified in the indictments) owned by appellee, The Wayne Pump Company (Opinion, pp. 7, 14).

After setting forth the charges of combination and conspiracy generically, as above, each indictment (or count thereof) alleges that the combination and conspiracy thus

charged "is now described in further detail, that is to say." However, although the succeeding allegations enumerate a number of separate acts or means which are alleged to have been "a part of said combination and conspiracy." (Opinion, pp. 5-6), they do not allege or describe any understanding, agreement or consensual arrangement among the defendants. "In fact there is no allegation that there was any understanding or agreement among the defendants at all, aside from the allegation that they 'knowingly have entered into and engaged in a combination and conspiracy to fix and maintain non-competitive prices * * *', etc. (Opinion, pp. 10-11).¹

III. The Demurrers and the Court's Ruling Thereon.

The District Court correctly summarized the demurrers filed by appellees and the questions before that Court as follows (Opinion, p. 6):

"The demurrers challenged the sufficiency of the indictments on the ground that *they fail to describe the alleged conspiracies and combinations* with which defendants are charged so as to inform them of the nature and cause of the accusations against them and enable them to properly prepare their defenses.

The cases are before me now for disposition on these demurrers."²

¹ The above statements concerning the indictments are taken from the opinion of the District Court. The summary of the indictments contained in the Government's statement as to jurisdiction departs widely from the construction adopted by the District Court, and is not accepted by appellees.

In fact, the Government's narrative representation that sundry charges were made in the indictments is calculated to produce the erroneous impression that those "charges" had been well pleaded. This begs the very question which was presented to and decided by the lower court, viz., whether or not those charges *were* well pleaded.

² All emphasis in this statement supplied, unless otherwise noted.

Such construction of the demurrers, which would in any event be conclusive, was concurred in by Government counsel in the court below.³

The basis of the District Court's decision sustaining the demurrers is stated in the last two paragraphs of its opinion as follows (Opinion, p. 14):

"It is fundamental that in every indictment the defendant is entitled to be informed with such definiteness and certainty of the accusations against him as will enable him to make his defense, and avail himself of acquittal or conviction in any further prosecution for the same offense. Having in mind that the subject matter of the instant indictments is protected by a patent, I am of the opinion that the defendants here have not been furnished with such definite and particular allegations of fact as will meet this test. The charges are much too general. *They do not adequately describe the nature of the alleged unlawful conspiracy, agreements or arrangements which defendants are accused of having made, nor show how the defendants became parties thereto, nor how they collaborated in doing the unlawful things; nor set out any unlawful means whereby the unlawful objectives were accomplished.*

Believing as I do, for the reasons heretofore stated, that the indictments are insufficient, the demurrers thereto will be sustained."

The Court's ruling was thus directly responsive to the sole ground of appellees' demurrers, to-wit: that the in-

³ In the oral argument on the demurrers, counsel for the United States said at p. 121 of the stenographic transcript of the hearing:

"These demurrers raise but one issue. They claim that these indictments do not inform the defendants of the nature and cause of the accusation brought against them; in other words, that their rights under the Fifth and Sixth Amendments have been violated."

Again, at p. 140:

"But the defendants have chosen their issue, and they have boiled it down to a single question of whether the defendants can prepare their defense on the basis of the facts alleged in these indictments."

dictments failed to describe with definiteness and certainty the combination and conspiracy constituting the offenses charged therein.

IV. The Principles Determining This Court's Jurisdiction.

In so far as here material, the Criminal Appeals Act provides as follows:

"A writ of error may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases, in the following instances, to wit:

From a decision or judgment . . . sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the . . . construction of the statute upon which the indictment is founded. . . ." (18 U. S. C. A. § 682).

The decisions of this Court construing the portion of the Criminal Appeals Act quoted above establish the following propositions:

(1) The right of appeal which is given to the Government thereby is "exceptional" and "strictly limited to the instances specified".

U. S. v. Borden Co. et al., 308 U. S. 188, 192;

U. S. v. Keitel, 211 U. S. 370, 399.

(2) Appeal does not lie from a judgment which rests on indefiniteness, vagueness or other deficiencies of an indictment as a pleading, as distinguished from a construction of the statute which underlies the indictment.

U. S. v. Borden Co. et al., 308 U. S. 188, 193.

(3) Nor does appeal lie in a case where the District Court has considered the construction of the statute, but has also rested its decision upon the independent ground of a defect in pleading. In such a case, this Court "cannot disturb the judgment below and the question of construction [of the statute] becomes abstract."

U. S. v. Borden Co., 308 U. S. 188, 193;

U. S. v. Hastings, 296 U. S. 188, 193.

(4) Where, as here, jurisdiction is invoked on the ground that the decision below was based upon a construction of the statute upon which the indictment was founded, it must *affirmatively* appear that the decision below was based on that ground and that ground alone. This Court is not called upon to search the record in order to ascertain whether the action of the court below *might* have been so predicated. In the absence of a clear expression that such was the ground of decision, appeal does not lie. All doubts and ambiguities are to be resolved against appellate jurisdiction.

U. S. v. Carter, 231 U. S. 492, 493-4;

U. S. v. Moist, 231 U. S. 701, 702, 703;

U. S. v. Halsey, Stuart & Co., 296 U. S. 451, 452;

U. S. v. Hastings, 296 U. S. 188, 193.

(5) This Court must accept the construction given to the pleadings by the court below.

U. S. v. Borden Co., 308 U. S. 188, 193.

V. The Grounds on Which Appellees Contend That This Appeal Does Not Lie.

The District Court unquestionably decided the sole issue which was presented by the demurrers—that the indictments as a whole failed to describe the alleged conspiracies and combinations with sufficient definiteness and certainty to inform appellees of the nature and cause of the accusations against them. As the appellees interpret the opinion of the District Court, that was the only ground on which its judgment sustaining the demurrers was based. But whether or not such was the sole ground of decision, it was certainly the primary, and an independent, ground thereof. That being the case, whether the Court also decided any other question is wholly immaterial to a consideration of the right of the United States to appeal. The Government would be entitled to appeal only if it made a clear showing that the judgments below were based solely on a construction of the Sherman Act. This it has not done, and cannot do.

VI. The District Court's Decision.

As appears on the face of the demurrers, and from the portion of the District Court's opinion quoted above, the appellees in the court below challenged the indictments on the fundamental ground that they failed to advise them, as required by the Fifth and Sixth Amendments to the Constitution, of the nature and cause of the accusations against them. That challenge was not, as suggested in appellant's statement as to jurisdiction, a formal or technical one, but raised the vital and substantial point that the charges of combination and conspiracy made in the indictments were so generic and so lacking in factual and identifying information that the defendants were left completely in the dark as to the offenses intended to be charged. In other words, the fundamental challenge made by defendants was that although the indictments charged in conclusory terms that the defendants had engaged in a combination and conspiracy to fix prices on computer pumps and to monopolize computer pumps and computing mechanisms, there was a complete lack of identifying facts adequately describing the nature, character and terms of those conspiracies.

As pointed out by the court below (Opinion, p. 14), it is "fundamental that in every indictment the defendant is entitled to be informed with such definiteness and certainty of the accusations against him as will enable him to make his defense, and avail himself of acquittal or conviction in any further prosecution for the same offense". Where, as is true of the Sherman Act, the offense is described in the statute in general terms, it is not sufficient for the indictment to charge a violation in the generic language of the statute. It must descend to particulars by apt averments of fact. Since the requisite degree of particularity thus varies with the nature and character of the crime intended to be charged, the necessity of definite aver-

ment is commensurately increased when a charge of conspiracy to restrain trade or monopolize is made with respect to articles of commerce which are themselves the subject matter of the grant of a perfectly legitimate, though limited, monopoly, to-wit: a patent monopoly, the protection or exploitation of which permits the patentee to impose certain terms and conditions on licensees pursuant to license agreements. Or, as stated by the court below (Opinion, p. 14), approach to the challenge leveled by appellees at the indictments had to be made "having in mind that the subject matter of the instant indictments is protected by a patent * * *".

An examination of the District Court's decision discloses that the court never lost sight of the fundamental issue that was before it—the sufficiency of the factual averments as to the combinations and conspiracies charged. Again and again the Court applies to the allegations of the accusatory portions of the indictments the tests of certainty, definiteness and understandability. What do the averments mean? Do they identify to the defendants what the intended charges are? Do they disclose an understanding or agreement? These, and other like inquiries, have to do solely with the sufficiency of the indictments as pleadings. They have nothing whatever to do with substantive questions involving a construction of the Sherman Act.

All told, during its consideration of the indictments, the District Court *ten* separate times calls attention to the absence of clarity and identifying facts in the indictments.

The Court first points out that the indictments charge the appellees with "using the Jauch patent" for the purpose of fixing prices among themselves on the sales of computer pumps and * * * restricting the manufacture and sale of such pumps". This charge, singled out for comment in appellant's Statement as to Jurisdiction (pp. 4, 5), is the introductory allegation in the paragraphs averring.

"means" which were "parts" of the conspiracies complained of, and from the context of the Court's opinion is obviously one to which great importance was attached by the Government. But, the Court remarks (Opinion, p. 10), "what is meant by the phrase 'use the Jauch patent' is not quite clear". Nor does the indictment, says the Court:

"allege that there was any *understanding or agreement* among the defendants to use the patent to fix prices on any unpatented article. In fact, there is no allegation that there was any understanding or agreement among the defendants at all, aside from the allegation that they 'knowingly have entered into and engaged in a combination and conspiracy to fix and maintain non-competitive prices and to monopolize the manufacture and sale of computer pumps and computing mechanisms, by the doing of the things set out.' "

The trial court thus plainly condemns the primary allegations of means for their failure to particularize, to specify, to identify, so that defendants may know the nature of the charges against them. This significant conclusion of the District Court is stated at page 11:

"The difficulty is that the Government fails to set out any *identifying facts* to show that the Wayne Pump Company and its licensees did anything more than the law permitted them to do under the monopoly granted by the patent. *How they took joint action or entered into joint agreements to use the Jauch patent to achieve alleged illegal objectives, or how they went outside the monopoly granted to the patentee and its licensees, is nowhere set out in the indictment.*"

The trial judge could not have indicated more clearly that he was condemning the indictments because of their vagueness and indefiniteness—their failure to set forth "identifying facts" which would advise appellees of the nature and cause of the accusation against them.

In discussing the next group of allegations relied upon by the Government, the Court's inquiry is again directed to the lack of clearness and the absence of identifying facts in such averments. One of the allegations, the Court points out (Opinion, p. 11), was that appellees attempted to compel the Neptune Company to submit all patents owned or controlled by it to "uses determined by Wayne". As to that averment, the Court says:

"Again it is not clear what is meant by the allegation that defendants attempted to compel Neptune to submit all patents owned or controlled by it on computer pumps 'to uses determined by Wayne.'"

The related averment that defendant Wayne Company approached gasoline pump manufacturers, who had purchased computing mechanisms from Neptune and other manufacturers, and attempted to induce them to accept licenses under the Jauch patent, is disposed of in the same manner. Says the Court (Opinion, p. 12):

"If in attempting to induce these manufacturers to accept such licenses, the Wayne Company, or any other of the defendants, made use of unlawful means, then those facts should be set out in the indictments."

The Court then discusses the allegations that appellees Veeder, G. & B. and Tokheim acknowledged the validity of the Jauch patent. Again the Court points out that (Opinion, p. 12):

"If any unlawful means were used in securing this acknowledgment, then the indictments should set them out clearly enough for defendants to meet these charges."

The Court then refers to the charge that as one of the means for the effectuation of the alleged price-fixing and conspiracy, appellees determined jobber resale prices for computer pumps and refused to sell to those jobbers not

adhering to such prices (Opinion, p. 12). The Court recognizes the well settled law that attempts to regulate resale prices of patented articles, after a complete sale by the owner, are unlawful, but finds that the defect in the indictments is their failure to allege facts, saying (Opinion, p. 13):

"However, *no facts* are set out to show that the Wayne computer pumps were sold through jobbers, nor are the names of any specific jobbers given with whom these defendants carried on negotiations wherein the resale price of computer pumps were determined."

After referring to and quoting at length from the case of *United States v. Colgate*, 253 Fed. 522, in which the absence of such allegations was held to have rendered an indictment defective for indefiniteness (Opinion, p. 13), the trial court sums up its findings on the subject of resale price maintenance as follows:

"So in the case at bar, if these conditions exist, the Government should have no difficulty in setting forth at least one specific instance of where defendants determined the resale price at which jobbers might sell computer pumps. If this condition does exist, surely the Government must be in possession of the facts, and *they should be set out in the indictments, so as to reasonably inform defendants of the offenses with which they are charged.*"

Again it is apparent that the Court was deciding only that the indictments failed to allege sufficient facts—failed as a matter of pleading to comply with the requirement of the Sixth Amendment to the Federal Constitution.

The Court concludes its seriatim discussion of the allegations of the indictments by considering the contention of the Government with respect to the asserted aggregation of competing patents on computer pumps and computing mechanisms. The importance attributed by the Government to this subject is emphasized by the comment thereon

in its Statement as to Jurisdiction (pp. 4, 5). Here again the trial court does not consider the substantive question of whether or not, if competing patents were involved, the indictments would charge an offense under the Sherman Act, but discusses what facts are disclosed by the indictments as to the asserted existence and aggregation of such patents. The Court points out that the indictments (Opinion, p. 13):

“set out no facts whereby to identify these competing patents, nor in what manner nor by whom such monopoly in them was acquired.”

Again (Opinion, p. 14):

“the indictments are silent as to the identity of the other patents aside from the Jauch patent issued in November, 1932.”

From the foregoing resume of the comments of the Court in its seriatim analysis of the allegations of the indictments, one and only one central theme emerges, namely, that such allegations and the indictments as a whole are devoid of identifying facts sufficient to apprise the appellees of just what charges are intended to be made against them. This is made clear when the Court focuses its attention on the accusatory portions of the indictments *as a whole*, and in the concluding paragraphs of its opinion (quoted in full on page 3 of this statement) sums up the pleading deficiencies of the indictments.

Furthermore, the trial court finds that the indictments lack those essential averments without which no conspiracy indictment can stand against demurrer—a factual allegation of the consensual arrangement which constitutes the alleged combination or conspiracy. Addressing itself to this fatal defect in the pleadings, the District Court said (Opinion, p. 10):

“• • • there is no allegation that there was any understanding or agreement among the defendants at

all, aside from the allegation that they 'knowingly have entered into and engaged in a combination and conspiracy to fix and maintain prices and to monopolize the manufacture and sale of computer pumps and computing mechanisms, by the doing of the things set out.' "

And so, the Court concludes (Opinion, p. 14):

"The charges are much too general. They do not adequately describe the nature of the alleged unlawful conspiracy [,] agreements or arrangements which defendants are accused of having made, nor show how the defendants became parties thereto, nor how they collaborated in doing the unlawful things"

How, we respectfully ask, can it be contended that the District Court did not rest its decision upon a question of pleading, when the Court in plainest terms found the indictments as a whole fatally defective in factual averments of the conspiratorial arrangement?

The Government in its Statement as to Jurisdiction (p. 6) attempts to explain the repeated references by the District Court to the indefiniteness and uncertainty of numerous averments of the indictments, as well as the Court's final conclusion (Opinion, p. 14) that the indictments as a whole were too general, conclusory and lacking in factual allegations as to conspiracy by saying:

*"It seems clear that the court, in stating that certain allegations were insufficient in form, meant that if those allegations were intended to charge *anything beyond what the court found to be exempt from the Sherman Act by reason of the patent privilege*, the allegations fail to do so in clear and certain terms."*

This position is completely disproved by what the District Court said in considering the indictments as a whole (Opinion, p. 14) with respect to their averments as to combination and conspiracy. The Court does not there consider merely charges "beyond what the Court found to be

exempt from the Sherman Act" but finds each indictment "too-general" with no adequate description of "the nature of the alleged unlawful conspiracy [,] agreements or arrangements" or any showing as to "how the defendants became parties thereto nor how they collaborated in doing the unlawful things". These are all purely pleading questions, going to the sufficiency of the whole indictment and in no respect dependent upon what the Court might consider that defendants could or could not do within the scope of patent laws.

The more searching the analysis of the opinion of the District Court the more plain does it become that the one issue which the Court intended to decide and did decide was that presented by the demurrers, namely: the sufficiency of the indictments as criminal pleadings. True, in the course of his opinion and by way of determining what the pleadings intended to charge the defendants with having conspired to do, the trial court made certain observations concerning the substantive law. The Court was trying to find out whether the grand jury intended, for instance, to charge the defendants merely with entering into the usual patent license agreements or whether the indictments were intended to charge something more.

The District Court must have concluded that the offense intended to be charged could not have been merely the doing of what this Court in numerous decisions has said a patent owner and his licensees may lawfully do, but that the indictments must have intended to charge more than merely engaging in lawful patent licensing activities.⁴ What that

⁴ Indeed, it was frankly conceded by Government counsel on the argument of the demurrers that the Government was not relying on the illegality of the patent license agreements in this case. Counsel said (p. 143, Transcript of Argument):

"It is not the case of "A" licensing "B". It is not the case of "A" then licensing "C", two independent actions. . . . There is no allegation here that the licensor imposed a price, a price schedule, on its licensees."

"more" was, however, the indictments failed with clearness and certainty to disclose. Obviously, if the Court was to give realistic and intelligent consideration to appellees' contention that the indictments did not reasonably define the material issues which they must prepare to meet at the trial, it was but natural and proper for it to consider those acts which were within the accepted and normal activities of licensors and licensees for whatever light such consideration threw upon the clarity and definiteness of the pleadings. The point is, however, that such consideration was in no sense a determination of any controverted questions of substantive law. The trial court was properly exercising its informed judgment in appraising the pleading issues, and its consideration of the substantive law was merely a part of the background in the light of which the Court determined the disputed questions of criminal pleading before it.

Whether, in the abstract, the observations of the District Court on the substantive law were technically correct or incorrect, therefore, is immaterial to a determination of the Government's right to appeal herein. Nor is it material whether the court was right or wrong in the process of reasoning by which it arrived at its conclusion that the indictments were bad as a matter of pleading. The only question here is whether, on a fair reading of the District Court's opinion, it can be said that the Government has sustained the burden of showing clearly that the orders of that court were based solely upon a construction of the Sherman Act—an issue which was not even before the court.

The Government's Jurisdictional Statement implies that the burden rests on appellees to establish that the District Court based its decision on the "independent ground of indefiniteness", and that the decision is subject to review by this Court, unless it "can be said" that the ground of the

District Court's decision, that the indictments were fatally defective as pleadings, was an "independent" ground.

This is a misconception of the declared principles governing this Court's review. The burden rests on the Government to establish that the District Court's decision was based on a construction of the Sherman Act. *U. S. v. Carter*, 231 U. S. 492; *U. S. v. Moist*, 231 U. S. 701. If it does not "clearly appear" that it *was* so based, then, as held in the above cases, jurisdiction does not exist.

The question whether there is an "independent" ground of decision cannot arise unless and until it first appears that the decision certainly *rests* on the ground of a construction of the Sherman Act, and *also* rested, or may also have rested, on another ground not open to review by this Court. *U. S. v. Hastings*, 296 U. S. 188. Government counsel do not claim there were *two* grounds here; their claim is that there was only one ground on which the decision was "*based*", but they contend that that ground was a construction by the District Court of Sections 1 and 2 of the Sherman Act.

Viewing the opinion in the light most favorable to the Government, the best that can be said is that the observations of the court as to the law of the Sherman Act deprive the opinion of being one hundred per cent a matter of pleading and, therefore, make it doubtful that the District Court's decision was based on that ground. That, however, is not enough to establish the jurisdiction of this Court when the test of such jurisdiction is that the statutory construction basis of the decision must "clearly appear".

The Government's suggestion that the sole ground upon which the court below rested its decision was a construction of the Sherman Act is truly extraordinary, when it is borne in mind that the court's opinion clearly discloses (1) that the court understood that it was deciding the sufficiency of the indictments as pleadings and so stated,

and (2) that that was the sole issue presented to the District Court for determination. No decision of this Court has been found, and we apprehend there is none, to the effect that a decision by a lower court upon a question of substantive law not before it for consideration gives this Court jurisdiction to review the case under the Criminal Appeals Act, despite the fact that the District Court has considered and passed upon the sufficiency of the indictment as a pleading.

The basis of the rule that appeal does not lie unless the lower court has based its decision solely upon the construction of the statute on which the indictment is founded is that, if the judgment also rests upon a ground of criminal pleading adequate to support it, this Court could not reverse the judgment below, whatever its construction of the statute. It is plainly demonstrable from the analysis of the opinion above set forth that the vagueness and indefiniteness of the indictments was the primary, if not the only, ground of decision below, and that the court's holding thereon was plainly adequate to support its judgment. The District Court repeatedly passed on questions of pleading, going to the heart of the indictment, sufficient to support its decision sustaining the demurrers, and which this Court could not disturb, under the rule of the *Hastings* and *Borden* cases, *supra*, if it entertained appeal and construed the Sherman Act. To recapitulate in this regard, the District Court expressly ruled:

- (1) That the charges in the indictment as a whole were much too general;
- (2) That the allegations therein did not adequately describe the nature of the alleged conspiracy, nor how the appellees became parties thereto or collaborated pursuant thereto;
- (3) That there were no clear or definite allegations describing the allegedly competing patents allegedly aggregated by appellees;

- (4) That there were no clear and definite allegations identifying the manner of aggregation or the appellee aggregating the same;
- (5) That there were no specific and definite allegations describing facts necessary to enable appellees to prepare for trial in respect of the charge of resale price maintenance;
- (6) That there were no facts identifying the nature of the charge in respect of acknowledgment of validity of the Jauch patent;
- (7) That there were no clear and definite allegations concerning the charge of inducement of other manufacturers to accept patent licenses;
- (8) That the purport of the charge that the defendants had attempted to compel Neptune to submit all patents owned or controlled by it "to uses determined by Wayne" was not clear; and
- (9) That the most important charge of intended means for effectuation of the alleged conspiracy, to-wit: that the appellees had used the Jauch patent for the purpose of fixing prices among themselves or monopolizing, was ambiguous and lacking in the particularization necessary to permit the appellees adequately to prepare for trial.

The foregoing ambiguities cover the entire range of the allegations of both indictments, as well as the heart thereof, to-wit: the basic charge of conspiracy, to which all other allegations are subsidiary, and around which the entire indictment is constructed. How, in the light of such determinations by the trial court, binding on this Court under its previous decisions, review by this Court of the abstract statements of the patent—anti-trust law background would serve any useful purpose is not suggested by the Government in its jurisdictional statement. We must respectfully submit; moreover, in the light of such review, that the Government's contention that vagueness and indefiniteness

was not, at the very least, a primary and independent ground of decision by the court below is wholly without foundation. The appeals should be dismissed.

Respectfully submitted,

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CHARLES ELMORE CHAPLEY
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1942.

Nos. 81-82

THE UNITED STATES OF AMERICA,
Appellant,

vs.

THE WAYNE PUMP COMPANY, ET AL.,
Appellees.

THE UNITED STATES OF AMERICA,
Appellant,

vs.

THE WAYNE PUMP COMPANY, ET AL.,
Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

BRIEF ON BEHALF OF THE WAYNE PUMP COMPANY, B. F.
GEYER, TOKHEIM OIL TANK AND PUMP COMPANY, VEEDER-
ROOT, INCORPORATED, G. H. ANTHONY, J. H. CHAPLIN,
GASOLINE PUMP MANUFACTURERS ASSOCIATION AND G.
DENNY MOORE, APPELLEES.

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IN THE
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OCTOBER TERM, 1942.

Nos. 81, 82.

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ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
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**BRIEF ON BEHALF OF THE WAYNE PUMP COM-
PANY, B. F. GEYER, TOKHEIM OIL TANK
AND PUMP COMPANY, VEEDER-ROOT, INCORPO-
RATED, G. H. ANTHONY, J. H. CHAPLIN, GASO-
LINE PUMP MANUFACTURERS ASSOCIATION
AND G. DENNY MOORE, APPELLEES.**

OPINION BELOW.

The opinion of the District Court (R. 27-43)¹ is reported
in 44 Fed. Sup. 949.

¹ All record references herein, except as otherwise stated, are to
the record in No. 81.

JURISDICTION.

The jurisdiction of this Court has been invoked by the Government under the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246, as amended to March 26, 1942 (18 U. S. C. § 682), providing, in so far as here material, as follows:

"An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases, in the following instances, to-wit:

"From a decision or judgment . . . sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is *based upon the . . . construction of the statute* upon which the indictment is founded. . . ."

The district court sustained appellee's demurrers to the indictments on February 24, 1942 (No. 81, R. 43; No. 82, R. 45). The appeals were taken on March 26, 1942 (No. 81, R. 45; No. 82, R. 47). On April 10, 1942, appellees filed a statement opposing the jurisdiction of this Court. This Court, on May 25, 1942, postponed further consideration of the question of its jurisdiction until the present hearing (No. 81, R. 48, No. 82, R. 50).

² Throughout this brief, emphasis is ours unless otherwise noted.

THE QUESTION PRESENTED.

The sole question presented is whether this Court has jurisdiction of these appeals under the Criminal Appeals Act, as in effect at the date of appeal (March 26, 1942).

There is not, as suggested by the Government (Br., p. 2), any question as to whether or not the indictments, to which demurrers were sustained below, state violations of the Sherman Act, upon which they are founded. The appellees have never raised that question. They have consistently contended only that the indictments were so vague and indefinite, particularly in the lack of description of the alleged consensual arrangement constituting the core of each offense charged, that appellees have received no fair notice of the accusations against them. As stated by the court below, in summarizing the demurrers filed by appellees (R. 33):

"The demurrers challenge the sufficiency of the indictments on the ground that they fail to describe the alleged conspiracies and combinations with which defendants are charged so as to inform them of the nature and cause of the accusations against them and enable them to properly prepare their defenses.

"The cases are before me now for disposition on *these* demurrers."

The issue of pleading *actually* presented by such demurrers and decided by the court below is, under well settled principles, not before this court for adjudication.

The substantive question *not* presented by such demurrers and never litigated below, which the Government now seeks to inject into this case, is likewise not before this Court for adjudication. Appellees were then and are now unable to litigate that question because of their lack of knowledge of the charge made against them.

STATEMENT OF THE CASE.

THE INDICTMENTS.

A. Preliminary.

The summary in the Government's brief (pp. 4-12) of the indictments is inaccurate and misleading, in that it (1) states the Government's interpretation of what, in its view, the Grand Jury intended to charge therein, rather than the averments actually made therein, and (2) departs from the construction placed upon the indictments by the district court, which is, of course, controlling and not open to question in this Court. (*U. S. v. Hastings*, 296 U. S. 188, 192; *U. S. v. Borden Co.*, 308 U. S. 188, 193.) Accordingly, we shall endeavor to set forth below, for the information of this Court, a statement of the material allegations actually made in the indictments, as construed by the district court.

B. The General Charges and the Parties.

In the indictment in No. 81 (R. 4-19), hereinafter sometimes called the "price-fixing indictment," appellees are charged with engaging in a conspiracy to fix, maintain and control arbitrary, artificial and non-competitive prices for the sale of computer pumps, in violation of Section 1 of the Sherman Act.

In the indictment in No. 82 (R. 3-21), hereinafter sometimes called the "monopoly indictment," the appellees (except the Gasoline Pump Manufacturers Association and G. Denny Moore, its Secretary, not parties to such indictment) are charged with engaging in a conspiracy to monopolize the manufacture and sale of computer pumps (Count I) and a like conspiracy with respect to computing

mechanisms (Count II), in violation of Section 2 of the Sherman Act:

The appellees, The Wayne Pump Company ("Wayne"), Gilbert and Barker Manufacturing Company ("G & B"), and Tokheim Oil Tank and Pump Company ("Tokheim"), are engaged in the manufacture of computer pumps (R. 28). The appellee Veeder-Root, Incorporated ("Veeder"), is engaged in the manufacture of computing mechanisms (R. 28). The appellee Gasoline Pump Manufacturers Association (the "Association") is a trade association whose membership consists "for the most part of gasoline pump manufacturers" (R. 28). The individual appellees are officers of the above named corporate appellees and an employee of the Association (R. 28).

C. The Background of the Alleged Conspiracies.

The articles of commerce alleged to be the subjects of the conspiracies are "computer pumps" and "computing mechanisms." Both are "covered by patents issued by the United States" (R. 33).

The computer pump is a gasoline pump embodying a computing mechanism (R. 28). The development of gasoline pumps progressed with the automobile industry, but prior to 1932 no pump had been developed which would automatically calculate and register both the quantities and prices of the gasoline dispensed (R. 33). On November 22, 1932, a patent was issued to Jauch, an employee of Wayne, covering the computer pump, which was subsequently assigned to Wayne (R. 33). This is the only patent identified in the indictments (R. 41). The Jauch patent revolutionized the gasoline pump business and computer pumps soon superseded all other types of pumps, so that by 1939 they represented over 90% in value of all gasoline pumps manufactured and sold in the United States

(R. 33-4). The patented pump was greatly favored by the public because the customer was able to see at a glance both the price and quantity of the gasoline he had purchased (R. 34). The public demand for these pumps became so great that for several years it has been all but impossible for a gasoline pump manufacturer to continue in business unless he manufactures computer pumps (R. 34). The Jauch patent dominates the computer pump field (R. 42).

The Jauch patent is a combination patent covering any combination or unit which embodies "(1) A source of liquid supply. (2) A pump, the suction side of which is connected to said source of liquid supply. (3) A meter. (4) A registering means operated by said meter for registering the liquid dispensed and the cost thereof. (5) Means for changing the relation between the cost operating portion whereby the unit cost per unit amount dispensed may be varied" (R. 39)³.

A "computing mechanism" is thus an indispensable element of the computer pump (R. 39). The term "computing mechanism", as used in the indictments, however, is employed in two senses (R. 28). It may refer to all those parts of a computer pump which simultaneously calculate and register quantities and prices of gasoline dispensed by the pump (that is to say, elements (4) and (5) of the Jauch combination); or it may refer only to that part of a "computing mechanism", as last defined, which is used to vary the operation of the price register therein contained (corresponding to element (5) of the Jauch combination) (R. 28). Neither indictment specifies in any of the repeated instances of use of the term (in-

³ The five elements in the combination were found by the district court on the basis of the decision in the infringement case of *Wayne Co. v. Anchor Oil Co.*, 20 Fed. Supp. 745, dismissed by common consent in the briefs and arguments of counsel below (and in the brief of the Government in this Court—pp. 29, 55) as though it were a part of the indictments.

cluding its use in describing the subject matter of Count II of the monopoly indictment) which of the two defined meanings is to be assigned thereto.

In any event, for the development of a commercially feasible computing mechanism, Wayne turned to Veeder (R. 9, 30), and the latter developed and has since manufactured for Wayne and its licensees a commercially feasible computing mechanism (R. 9, 30).

In addition to the dominant Jauch patent covering, *inter alia*, the use of any computing mechanism as a part of the patented combination, Wayne also owns or controls patents relating to computing mechanisms themselves (R. 29, 39). The character and scope of these latter patents are not stated (R. 41).

Following the grant of the Jauch patent and the commercial development of the computer pump manufactured thereunder, Wayne granted licenses to G & B and to Tokheim to make, use and sell computer pumps (R. 34). Although the indictments nowhere so state in terms, it is obvious from the allegations thereof as a whole that such licenses, as initially granted, were residual licenses—that is, licenses granting G & B and Tokheim exclusive rights (except for those reserved by Wayne) to make, use and vend. At a later period, when the computer pump became a success and the public demand for it became great, Wayne, with the consent of G & B and Tokheim, granted licenses to eight other pump manufacturers (R. 34). All such licenses contained restrictions as to the prices at which the pumps could be sold (R. 37.)

Wayne, G & B and Tokheim are the three leading manufacturers of gasoline pumps in the United States and during 1939 sold 56% in value of all computer pumps sold therein (R. 31). As might be expected in view of the premises, Wayne and all its licensees during the same year manufactured and sold 100% of the computer pumps sold therein (R. 31).

Veeder has continued to manufacture for Wayne and its licensees the computing mechanisms which are incorporated in and constitute an indispensable element of the Jauch computer pump (R. 30, 31). In prior years the Neptune Company ("Neptune") manufactured computing mechanisms for use in the manufacture of computer pumps by unlicensed manufacturers. Wayne filed an infringement suit against a user of one of these pumps, which was defended by Neptune. The United States District Court which tried the case found the Jauch patent valid, and infringed by both Neptune and the pump manufacturer, and enjoined Neptune from further manufacture of computing mechanisms for use in computer pumps (R. 39).

D. The Accusatory Portions of the Indictments.

After alleging the background, the indictments, in each instance, set forth the accusation made against the appellees, under the heading of "The Combination and Conspiracy". These accusations are found in paragraphs 26 and 27 of the price fixing indictment (No. 81, R. 10-13) and paragraphs 26 and 27, and 32 and 33, of the monopoly indictment (No. 82, R. 9-11, 15-17).

1. The Price Fixing Indictment.

In paragraph 26 of the price fixing indictment it is stated in conclusory fashion that appellees

"... beginning in or about the year 1932, ... and continuously thereafter up to ... the date ... of this indictment, knowingly have entered into and engaged in a combination and conspiracy to fix, maintain, and control arbitrary, artificial and non-competitive prices for the sale of computer pumps ..., in violation of Section 1 of ... the Sherman Act; which combination and conspiracy is now described in further detail, that is to say": (R. 10).

The court below found (a) that, aside from the foregoing, "there is *no allegation* that there was *any understanding or agreement* among the defendants at all * * *" (R. 37),³ and (b) that "*How* they [the defendants] took joint action or entered into joint agreements" or "*how* they collaborated" "is nowhere set out in the indictments" (R. 38, 43).

As further pointed out by the court, "thirty *separate acts* or means are then enumerated" in the succeeding paragraph 27, "which are alleged to be 'a part of said combination and conspiracy'" (R. 32).

The only connection alleged between said "acts" themselves, or between said acts and the preceding allegation of "conspiracy" is that they are "parts" of said conspiracy. It is *not* alleged, either "specifically" or otherwise,—although the Government frequently so indicates in its brief,—that said acts were agreed upon by the appellees, or any of them. Nor, accordingly, is the nature or manner of formation of any agreement with respect thereto set forth. The process by which those "separate" acts or things became a part of the conspiracy or related to each other is nowhere disclosed. Moreover, as shown by the discussion hereinafter contained, those "separate" acts or things are themselves so inadequately alleged that the conduct intended to be described is obscure and at times incomprehensible.

A statement of the major "acts" stressed by the Government below and in its brief in this Court, and dealt with in the opinion of the court below, discloses the structure of the indictment, the difficulties found therewith by the court below, and the unwarranted interpretation assigned thereto by the Government herein.

³ Except "ordinary patent license agreements" between Wayne and *certain* of the other appellees respectively (see p. 7, *supra*), of which the indictments did not intend to complain as such (R. 37), as conceded by the Government herein (pp. 32-33, *supra*; Gov. Br. pp. 45-49).

Thus paragraph 27 alleges that "it is and has been a part of said combination and conspiracy"

"that the defendants, Wayne, G. & B. and Tokheim use the Jauch patent owned by Wayne for the purpose of fixing prices among themselves on their sales of computer pumps";

"that the defendant Wayne license the defendants G. & B. and Tokheim under the Jauch patent to make, use and sell computer pumps";

"that the defendants, Wayne, G. & B. and Tokheim, devise a formula for determining minimum prices for the sale of computer pumps; that the defendant Wayne, on the basis of aforesaid formula, determine prices for the sale of computer pumps * * *; that the defendant Wayne from time to time issue announcements and regulations stating and interpreting the aforesaid prices * * *; [and] that the defendants, Wayne, G. & B. and Tokheim, in selling computer pumps, adhere to the prices * * * contained in the aforesaid announcements and regulations * * *"
(R. 11-12.)

The Government in its brief characterizes these allegations as follows:

"The appellees Wayne, G. & B., Tokheim and *Vee*der agreed to give Wayne's Jauch patent a dominating position in their operations. (Br., pp. 7-8.) * * *

"The Jauch patent was * * * the facade of the combination." (Br., p. 39.)

"In addition to the general charge of conspiracy * * * the indictment charges specifically that it was agreed that Wayne, G. & B., and Tokheim would devise a formula for determining prices for the sale of computer pumps, on the basis of which Wayne would determine and announce the prices * * * fixed by agreement. Wayne, as well as G. & B. and Tokheim, agreed to adhere to the prices * * * thus announced." (Br., p. 9.)

"The indictment charges mutual agreement among

all the dominating manufacturers for the purpose and with the effect of fixing prices and eliminating competition * * *." (Br., p. 45.)

The contrast between the actual averments, as quoted above, and the Government's characterization thereof, points up the very difficulty found with the indictments by appellees and the district court. The Government in its brief, by characterization and the addition of vital words absent from the indictment, attempts to supply what the draftsman of the indictment either neglected or was unwilling to supply, namely, the explanation of *how* the separate acts alleged in paragraph 27 fitted into the conspiracy generally averred in paragraph 26 and fitted with each other. The Government, by subtle paraphrase, also seeks to remove obscurities in the description of the acts themselves, which the district court found prevented intelligent understanding of the acts attempted to be charged (R. 37).

Similarly, it is alleged in paragraph 27 that "it is and has been a part of said combination and conspiracy"

"that the said defendants [Wayne, G. & B. and Tokheim] determine jobbers' resale prices for computer pumps, refuse to sell computer pumps to any jobber failing or refusing to adhere to such resale prices, and eliminate discounts to all jobbers in the event of a general failure by jobbers to adhere to the said resale prices" (R. 12).

Of these allegations the Government says in its brief:

"They charge an *agreement* among the appellee manufacturers upon resale prices and a *further agreement* to boycott jobbers who do not adhere to those prices. They raise the issue whether *the joint action* of manufacturers in fixing resale prices, the *joint refusal* of manufacturers to deal with price-cutting jobbers, and the *joint elimination* by manufacturers of jobbers' discounts is an unlawful restraint of trade under the Sherman Act, when it is part of a *horizontal agreement* among the manufacturers to eliminate all price competition * * *" (Br., p. 34; see also Br., p. 10).

The Government thus again attempts to supply, by simple assertion, the vitally important missing links of "horizontal agreement" and "joint action" not appearing in the indictment and which the district court stated it was unable to find by construction (R. 37-8, 43).

Likewise, it is alleged in paragraph 27 that "it is and has been a part of said combination and conspiracy"

"that the defendants Veeder, G. & B. and Tokheim acknowledge the validity of the Jauch patent;"

"that the defendant Wayne acquire, by purchase or otherwise, ownership or control of all patents on computing mechanisms and computer pumps capable of competing with computing mechanisms manufactured by Veeder or with computer pumps manufactured by Wayne, G. & B. and Tokheim;" and

"that the defendant Wayne determine the use of all patents on computing mechanisms and computer pumps and improvements thereon owned or controlled by either of the defendants G. & B. and Tokheim" (R. 11).

Of these allegations, described as one of the "principal groups of allegations in the indictments," the Government in its brief says:

"the appellees *agreed* that G. & B. and Tokheim would acknowledge the validity of . . . Wayne's Jauch patent and surrender control of their patents to Wayne." (Br., p. 28.)

"the indictments charge . . . *agreements* among former and potential competitors binding them . . . to pool and suppress competing patents" (Br., pp. 23-24.)

It will be readily observed, however, that the actual averments say no such thing. They do not indicate that all the appellees were in any way concerned with the acts referred to, and they charge no agreement among them whatsoever, much less indicate whether one or more agreements were intended to be charged. On the contrary, they pose and leave unanswered those very questions. More-

over, although referring vaguely to "competing patents," they fail utterly to give any clue as to the identity thereof or of the (non-competing?) patents "determination of the use" of which is obscurely noted (R. 41, 38).⁶

2. *The Monopoly Indictment.*

The structure and allegations of the accusatory portions of both counts of the monopoly indictment (No. 82, R. 9-11, 15-17) are exactly the same as those of the price-fixing indictment, except for the generic charge of conspiracy and that all references to prices and to the Association contained in the price-fixing indictment are omitted.

After reciting generally that the appellees have engaged in a "conspiracy to monopolize the manufacture and sale of computer pumps" or computing mechanisms, as the case may be (No. 82, R. 9, 15-16), and explaining that the conspiracy is "now described in further detail, that is to say," such counts respectively enumerate 20 and 19 "separate acts or means," prefixed by the allegation that each "is and has been a part of said combination and conspiracy."

The first such act or means alleged in the first count of the monopoly indictment is

"that the defendants Wayne, G. & B. and Tokheim use the Jauch patent owned by Wayne for the purpose of restricting the manufacture and sale of computer pumps *to themselves*" (No. 82, R. 10);

Subsequently, it is alleged that it is "a part" of said conspiracy

"that the defendant Wayne with the consent of the

⁶ The only disclosure in the indictments, as construed by the court, of the general patent situation in this field, is that the Patent Office has issued, in the aggregate, "numerous patents" on the "subjects" of computer pumps, computing mechanisms, and improvements on computer pumps and computing mechanisms, including the Jauch patent (R. 30), which "revolutionized" the industry, "dominates" the field, and is alone identified (R. 33, 41-42).

defendants G & B and Tokheim approach gasoline pump manufacturers . . . and . . . induce each of such manufacturers to accept a license under the Jauch patent . . .” (No. 82, R. 11.)⁷

Of these allegations, the Government in its brief states, *inter alia*,

“The indictment then describes a conspiracy to regulate the entire industry from manufacturer to consumer, using as a device to accomplish that purpose the Jauch patent” (Br., p. 7).

“The indictments charge conspiracies . . . to monopolize commerce in computer pumps . . . by combination under agreements among former and potential competitors binding them . . . to cease competition and accept licenses under the Jauch patent . . .” (Br., pp. 23-4).

The above quotations not only dramatize the confusion and vagueness of the indictments, but again emphasize the fundamental pleading defect therein, viz., the absence of meaningful allegations of consensual arrangement, and the Government's belated endeavor to remedy *ex parte* in its brief both such confusion and omission by gratuitous interpolations into the language actually employed by the draftsman. Thus, the Government now advises that the Jauch patent was used as a mere “device” or “facade” (Br., p. 39) to accomplish a nefarious purpose, although the draftsman studiously avoided any such charge; we are also now informed that the nefarious purpose was regulation of “the entire industry,” whereas the indictment alternatively refers to restriction of manufacture of computer pumps to Wayne, G & B, and Tokheim alone, and, paradoxically enough, to their campaign to induce other manufacturers to make such pumps; and finally we are informed that all this activity took place pursuant to

⁷ Each of these allegations refers to a period of time beginning in 1932 and continuing to the date of the indictment (No. 82, R. 4).

agreements among the appellees to which the draftsman nowhere adverted.

Reference to one further set of allegations, and to the Government's present characterization thereof, will be illuminating. In both counts of the monopoly indictment (as well as in the price-fixing indictment) it is alleged that it is a "part" of the conspiracy complained of

"that the defendants Wayne, G & B, and Tokheim purchase computing mechanisms only from the defendant Veeder;" and

"that Veeder sell computing mechanisms for use in the manufacture of computer pumps only to Wayne, G & B, and Tokheim and other purchasers approved by Wayne, G & B, and Tokheim;" (No. 82, R. 10, 16).

The Government now characterizes these allegations as follows (Br., p. 53):

"Wayne, G & B, and Tokheim *agreed* to purchase computing mechanisms only from Veeder and Veeder *agreed* to sell only to them and to other manufacturers approved by them (No. 82, R. 10)."

It will clearly be seen that the allegations, as made in the indictment, however, did not disclose (a) whether any agreement, as distinguished from a course of conduct was described, (b) if there were any agreement or agreements, who were the parties thereto, or (c) if there were any agreement or agreements, what was the nature thereof. The Government in a single stroke now belatedly seeks to eliminate all these ambiguities and difficulties created by the draftsman, and to advise the four appellees in question that a single mutual agreement covering the situation described was, in its view, intended to be charged.

THE DEMURRERS.

Appellees Wayne, Tokheim and Veeder, and their officers, demurred to the indictments (No. 81, R. 19-22, 23-25; No. 82, R. 21-24, 27-28) on the general ground that each failed "to describe and particularize the offense attempted to be charged therein with sufficient definiteness * * * to inform them of the nature and cause of the accusation," "in violation of the * * * Fifth and Sixth Amendments to the Constitution." This general ground of demurrer was reinforced and explained by the three succeeding paragraphs which pointed out the indefiniteness complained of as follows:

"2. The averments of said indictment purporting to charge a combination and conspiracy in restraint of trade are mere conclusions.

"3. Said indictment fails to make averments sufficient to identify and describe the supposed combination and conspiracy, in that it does not allege with particularity any of the following:

(a) The factual basis upon which the United States relies for its charge that a combination and conspiracy exists or has existed;

(b) The manner of formation of the supposed combination and conspiracy;

(c) The terms of the supposed combination and conspiracy; or

(d) The manner in and by which it is claimed that said defendants became parties to the supposed combination or conspiracy.

"4. The allegations in said indictment with respect to the supposed combination and conspiracy in restraint of trade, and to the intended means for the accomplishment thereof, are so vague, indefinite, uncertain, and conclusory in character as to fail to apprise this defendant of the manner in which the prosecution claims that it has violated the law pertaining to combination or conspiracy in restraint of trade among the several states."

The demurrer of the appellee Association, and its employee (No. 81, R. 25-26), though varying slightly in form, was substantially the same.

From the extracts quoted above, it is apparent that each demurrer complained of the vagueness and indefiniteness of the indictments in the two respects to which we have adverted in our previous summary of the material allegations thereof, namely, that:

(1) The indictments failed adequately to disclose the nature or manner of formation of the consensual arrangement suggested in conclusory fashion by the allegation of conspiracy made in each indictment and underlying every charge therein, or the manner in which the appellees assertedly became parties thereto, or the relation of the "separate" parts thereto or to each other. In short, the indictments were lacking in any meaningful averments of agreement.

(2) The indictments failed adequately to describe the terms of the defectively alleged consensual arrangement or agreement, viz., the things which appellees allegedly agreed to do.

That the court below fully understood that the demurrers challenged the indictments only for vagueness and indefiniteness on the scores set forth above, appears not only from the extract from its opinion quoted *supra*, p. 3, but also from its opinion as a whole. Government counsel in the court below likewise fully understood, and stated, that such vagueness and indefiniteness was the single issue presented to the court for decision.*

* In the oral argument on the demurrers, counsel for the United States said:

"These demurrers raise but one issue. They claim that these indictments do not inform the defendants of the nature and cause of the accusation brought against them; in other words, that their rights under the Fifth and Sixth Amendments have been violated."

THE DECISION BELOW.

The decision of the court below was directly responsive to the demurrers of appellees. It held (R. 27-43) the indictments bad for vagueness and indefiniteness both (1) for failure "adequately [to] describe the nature of the alleged unlawful conspiracy [,] agreements or arrangements which defendants are accused of having made," to "show how the defendants became parties thereto," and to show "how they collaborated in doing the unlawful things" (R. 43), and (2) for failure adequately to set out the material means whereby the alleged conspiracies were to be accomplished.

Each such ground was entirely adequate to support the decision, since a conspiracy indictment bad in either such respect is fatally defective.

The Government in its brief substantially ignores the first, and primary, ground of the decision, by assuming just the reverse of what the court decided. (See extracts quoted *supra*.) Although all its arguments are really, therefore, directed only to the second ground of decision, it, in terms, broadly contends (a) that the court below necessarily construed the Sherman Act in holding the demurrers vague and indefinite, and (b) that the pleading issue presented by the demurrers was frivolous.

Again:

"But the defendants have chosen their issue, and they have boiled it down to a single question of whether the defendants can prepare their defense on the basis of the facts alleged in these indictments." (See Statement Opposing Jurisdiction (p. 4).)

ARGUMENT.

I.

The Demurrers in Challenging the Vagueness and Indefiniteness of the Allegations in the Indictments Describing (A) the Alleged Conspiracies and (B) the Alleged Means for the Accomplishment Thereof, Presented Substantial Questions of Criminal Pleading for Disposition by the Court Below.

On the basis of an asserted analogy to cases arising on writs of error or appeals from judgments of state courts (cf. 28 U. S. C. § 344), the Government contends, *inter alia*, that this Court has jurisdiction to determine whether the indictments charged violations of the Sherman Act for the reason that the challenge thereto for vagueness and indefiniteness made in appellees' demurrers was "utterly lacking in merit" (Br., pp. 37-38).

This argument is, of course, predicated on the assumption that the court below grounded its decision on a construction of the Sherman Act, as well as upon the pleading issue which alone was presented by the demurrers. This we deny.

Moreover, we do not accept as applicable to appeals under the Criminal Appeals Act, the analogy sought to be drawn from the cases relied upon by the Government (Br., p. 37).¹ This Court has repeatedly stated that it will not inquire into pleading questions on Criminal Appeals

¹ So far as such cases decide the allegedly analogous proposition relied on by the Government at all, they merely indicate that a state court may not, in a case in which a litigant has presented a federal question, deprive him of hearing in this Court on that question by the subterfuge of purported adverse decision on an obviously frivolous ground of state law.

or search the record to ascertain whether the decision below might have been based on statutory construction, even where both types of question were raised (*U. S. v. Carter*, 231 U. S. 492, 493, 494; *U. S. v. Moist*, 231 U. S. 701, 703; *U. S. v. Halsey, Stuart & Co.*, 296 U. S. 451, 452).

Notwithstanding our view that the issue of criminal pleading decided by the court below is not before this Court in any sense, the point of its substantiality having been raised, we shall sketch briefly the legal theory of the demurrers, confident that such outline will demonstrate that the issues thus presented were real and substantial and cover the entire case.

A. The Challenge to the Allegations Describing the Consensual Arrangement, Upon Which the Validity of the Indictments as Pleadings Depends.

It is elementary that the gist of the crime of conspiracy consists in agreement in fact among the alleged parties thereto.² Such an agreement (consensual arrangement) may, of course, be created in a variety of ways. It may be formal or informal, written or oral; it may consist in an understanding, tacit or express; it may have been formed by piecemeal adherence to a preconceived plan; or by a chain of inter-related agreements made from time to time by various parties in effectuation of a mutual undertaking.³ But before the legal conclusion of conspiracy may be justified, such a meeting of the minds, constituting such an agreement in fact, must be alleged and proved.⁴

It is likewise elementary that, to constitute a proper

² *U. S. v. Falcone*, 311 U. S. 205, 210.

U. S. v. Piowaty, et al., 251 Fed. 375, 377.

U. S. v. Griffith Amusement Co., et al., 1 F. R. D. 229.

³ *U. S. v. Masonite Corp.*, 316 U. S. 265.

Interstate Circuit v. United States, 306 U. S. 208.

⁴ *U. S. v. Piowaty & Sons*, 251 Fed. 375.

Asgill v. U. S., 60 Fed. (2d) 780, 784-5.

conspiracy pleading, the agreement in fact claimed to have existed,—as distinguished from the circumstantial evidence from which the prosecution will ask the jury to infer the existence of such agreement—must be adequately averred.⁵ Without such a statement of the hypothesis to which the evidence is to be directed, defendants are helpless in preparation for trial (even if acquainted with all the evidence on which the prosecution might rely) and the trial court is unable intelligently to rule on the materiality of proof.

In these indictments, as pointed out above, the only allegation pertaining to an agreement, understanding or consensual arrangement among all the appellees is the conclusory allegation, in the language of the statute, that they “entered into and engaged in a combination and conspiracy.” As also pointed out, the combination and conspiracy is alleged to have existed for nine years and to have had some thirty separate “parts.” How those “parts” became such or are otherwise connected with the alleged “conspiracy” is nowhere disclosed. Which, if any, of the parties agreed to any such “parts” is nowhere alleged. The relationship of the parts to each other is nowhere pointed out. In fact, it seems obvious that, lacking evidence of a written or oral agreement or understanding or plan among the defendants to perform the “acts” enumerated, and, therefore, being unwilling to accept the responsibility of alleging one, or unable to articulate a theory by which the pieces fitted together, or being unwilling to disclose it, the draftsman resorted to the ingenious device of listing the “separate acts” which he hoped to prove and of stating that they were “parts” of a “conspiracy”, formation, existence and engagement in which is alleged only in the generic language of the statute.

⁵ *U. S. v. Piowaty & Sons*, 251 Fed. 375.

Pettibone v. U. S., 148 U. S. 197.

Asgill v. U. S., 60 Fed. (2d) 780, 784-5.

This, it was urged by appellees in the court below, would have been bad pleading in any Sherman Act conspiracy case. Where, as is true of the Sherman Act, the offense is described in the statute in general terms, it is not sufficient for an indictment to charge a violation in the generic language of the statute.⁶ It must descend to particulars by apt averments of fact, describing the offense (here conspiracy) intended to be charged.⁷ Without reasonably definite delineation of the basic issue in cases under that statute, frequently involving (as here) the operations of an entire industry over a period of years, undue prejudice to the defendants must result.

But, since the degree of particularity with which an offense must be pleaded varies with the nature and character thereof, the necessity for definite averment of the nature and manner of formation of the conspiratorial arrangement and of how the appellees became parties thereto and took action, assertedly joint, was commensurately increased in this case, in which charges of conspiracy to restrain trade and monopolize were made with respect to articles of commerce themselves the subject matter of the grant of a lawful, though limited, monopoly, to-wit, a patent monopoly. Such a grant permits the patentee to enter into certain agreements, and to impose certain terms and conditions on licensees in pursuance of that limited monopoly, and conversely, impose certain restrictions upon the freedom of action of all others. This Court is familiar with the sharp and, in many instances, refined distinctions drawn in the patent-antitrust field with respect to the permissible scope of such agreements, terms and conditions, and the extent of such restrictions. In such a field, therefore, specificity in pleadings is most essential if they are to have meaning. Or, as stated by the court below (R. 42), approach to the challenge leveled by appellees had to be made "having in mind that the subject matter of

⁶ *U. S. v. Cruikshank*, 92 U. S. 542, 557.

U. S. v. Carll, 105 U. S. 611, 612.

U. S. v. Hess, 124 U. S. 483.

⁷ See cases cited in footnote 6.

the instant indictments is protected by a patent * * *,"—not for the purpose of determining the substantive sufficiency of the indictments, but in order to determine whether they advised the appellees of the real issues which they must be prepared to meet at trial.

For the reasons recited, we believe that it is abundantly clear that the charge thus leveled by the demurrers presented a substantial issue of pleading fundamental to the protection of the rights of the appellees. We think it is also apparent that the challenge went to the root of the indictments which, without an adequate pleading of the consensual arrangement allegedly complained of, were fatally defective.*

B. The Vagueness and Indefiniteness of the Allegations of the "Means" or "Parts" of the Alleged Conspiracy.

As previously stated, it was also the contention of the appellees below that, entirely aside from the insufficiency of the allegations describing the nature and character of the consensual arrangement complained of in the indictments, the indictments were also defective for failure to state with clarity the "means" intended to be employed in the effectuation of the alleged conspiracy. In other words, it was argued that the indictments were not only defective for failure to make clear how or in what manner the parties agreed, but also for failure to state clearly what they agreed to do.

Without attempting to catalogue all the major defects of the indictments in this connection, it is sufficient to note at this point that they abound with such vague and illusory phrases as "use the Jauch patent," "determine the use of patents," "devise a formula for determining minimum prices" and "induce acceptance of licenses," and refer vaguely to such activities as monopolizing unidentified but competing patents, securing "control of * * *

* *U. S. v. Piowaty, et al.*, 251 Fed. 375, 377.

U. S. v. Falcone, 311 U. S. 205, 210.

ownership and official personnel" of licensees, etc. Such looseness of expression occurs repeatedly in the description of the acts or courses of conduct upon which, as appears from the opinion below, the Government placed greatest stress.

It is, of course, clear, that, if appellees' contention as to the vagueness and indefiniteness of the material allegations of "means" was correct, the indictments were defective and subject to dismissal. The court below sustained that contention on reasonable grounds clearly explained in its opinion. Whether or not the views of this or any other court faced with that pleading problem would have exactly coincided with the views of the court below is, of course, not in issue here.

II.

The Sole Basis for the Judgment Below Was the Vagueness and Indefiniteness of the Indictments, and on Well Settled Principles, This Court Is, Therefore, Without Jurisdiction.

The decisions of this Court construing the Criminal Appeals Act establish that direct appeal to this Court does not lie from a judgment sustaining a demurrer to an indictment which rests on indefiniteness, vagueness or other deficiencies of an indictment as a pleading, as distinguished from a construction of the statute which underlies the indictment. (*U. S. v. Borden Co., et al.*, 308 U. S. 188, 193.) Nor does appeal lie in a case in which a district court has grounded its decision on a construction of the statute underlying the indictment, but has also rested its judgment upon the independent ground of a defect in pleading adequate to support the decision. (*U. S. v. Borden Co., supra*; *U. S. v. Hastings*, 296 U. S. 188, 193.)

It is the contention of these appellees that the judgment of the court below was based entirely on the sole issue presented to it, viz., the vagueness and indefiniteness of the

indictments. As we have previously noted, the court below understood that the points presented by the demurrers were matters of pleading only and so construed the demurrers (R. 33), with the hearty acquiescence of Government counsel. To assume that the district court decided other issues which were never submitted to it by the demurrers would do violence to the presumption that the judgment of a court does not extend beyond the issues presented for adjudication.

In this case, however, it is immaterial whether, by what we conceive to be an erroneous interpretation of the opinion below, it may be said that the district court also rested its decision upon a construction of the Sherman Act. This is so because the district court unquestionably decided the pleading issue alone presented by the demurrers, whatever else it may also have decided. And it cannot be gainsaid that the pleading ground was certainly the primary, and an independent, ground of decision, and one which went to the sufficiency of the entire indictment as a pleading.

A. The Court Below Clearly and Unequivocally Determined That the Indictments Failed Adequately to Describe the Consensual Relationship Necessarily Constituting the Gist of the Offenses Attempted to Be Alleged. In So Doing It Was Not Necessary for the Court to Pass Upon, and It Did Not Pass Upon, Any Controverted Question of Substantive Law.

As appears from an examination of the demurrers themselves (pp. 16-17, *supra*) and the preceding discussion, the primary basis of the challenge for vagueness and indefiniteness made by the demurrers was the utter failure of the allegations in the indictments to disclose to the appellees the nature, or manner of formation, or other requisite information concerning the supposed consensual arrangements upon which the charges of conspiracy were predicated.

The opinion of the court below was directly responsive

to that challenge. It unequivocally held that the indictments as a whole were fatally defective because of this manifest insufficiency.

The court had first occasion to consider this broad challenge in connection with the contention made by the Government below (and repeated in its brief in this Court—Br., p. 25) that the pleadings in these cases were like unto that in *Standard Sanitary Mfg. Co. v. U. S.*, 226 U. S. 20. Commenting upon this contention of the Government, the court stated (R. 37-38):

“ * * * there is no allegation that there was any understanding or agreement among the defendants at all, aside from the allegation that they ‘knowingly have entered into and engaged in a combination and conspiracy to fix and maintain non-competitive prices and to monopolize the manufacture and sale of computer pumps and computing mechanisms, by the doing of the things set out.’ The things and means then set out are things which I believe the *patentee* under its patent already had the right to do.

“The Government argues that the instant case and the Bath Tub case have one basic common theme, that is, conspiracy, joint action, agreement to use the patent for the purpose of fixing prices among themselves. The difficulty is that the Government fails to set out any identifying facts to show that the Wayne Pump Company and its licensees did anything more than the law permitted them to do under the monopoly granted by the patent. How they took joint action or entered into joint agreements to use the Jauch patent to achieve the alleged illegal objectives, or how they went outside the monopoly granted to the patentee and its licensees, is nowhere set out in the indictments.”

The above extract from the court's opinion demonstrates conclusively the following:

(1) It was the court's view that the indictments contained no allegations pertaining to agreement or understanding among the parties except the conclusory charge that they “engaged in a * * * conspiracy”.

(2) It was the court's view, not disputed by the Government, that all the *acts* described in paragraph 27 of the indictment were acts which a patentee *individually* had the right to do.

(3) It was the court's view that the Government's argument that such acts, however lawful when done individually, could not be made the subject of agreement, was completely without application to the instant indictments, for the reason that there were no allegations whatsoever in such indictments adequately pleading either agreement or the manner of taking joint action.

(4) Whether or not the court was expressing an opinion on a substantive matter in stating that the acts charged in paragraph 27, if done by a patentee individually, were lawful, and if so, whether or not that view of the substantive law would have been correct or incorrect, is of no concern here. The court's conclusion that the indictments were devoid of definite allegations of agreement and of joint action was in no way dependent upon any opinion which it may have had at the time concerning substantive law.

(5) In short, it is apparent that the court's conclusion with respect to the lack of any sufficient averments as to agreement or other consensual arrangement would have been exactly the same whether it had found the means alleged in paragraph 27 to have been lawful or unlawful.

After reaching such conclusion that the indictments were devoid of adequate allegations of consensual arrangement, the court proceeded to consider *seriatim* the specificity of various of the allegations of "means" set forth in paragraph 27 of the indictments. This consideration was in response to the second, and independent, challenge of the demurrers to the definiteness of the indictments. *It is apparent, however, from an examination of the court's opinion with respect to each such means, that its entire*

discussion thereof is postulated on the assumption that there are no well pleaded charges in the indictments of an agreement or understanding to effectuate the conspiracies through such means.

This conclusion is buttressed by an argument made by the Government itself (Br., pp. 34-35). Thus, the Government complains that, in analyzing the allegations setting forth the so-called "resale price-fixing" means and holding them too vague and indefinite "reasonably to inform defendants" of the charge with respect thereto (R. 40-41), the court failed to consider that such alleged resale price fixing was "part of a horizontal agreement among" appellee manufacturers. The Government thus itself demonstrates the significant fact to which we have just called attention, viz., that the court's consideration of all the "means" allegations in the indictments was predicated upon its conclusion, theretofore reached and stated, that there were no adequate allegations of "horizontal agreement" among the appellees.

After completing its survey of such "means" allegations, and demonstrating in the course thereof on at least ten separate occasions that it was of the opinion that the second contention made by appellees was also well founded, viz., that the means themselves were obscurely alleged, the court summarizes its conclusions with respect to the indictments as a whole in the next to the last paragraph of its opinion (R. 42). In that summary, as in the preceding discussion, the court responds separately and distinctly to both points made by appellees' demurrers, and on each score condemns the indictments as a whole for failure to comply with the fundamental requirement that

"* * * in every indictment the defendant is entitled to be informed with such definiteness and certainty of the accusations against him as will enable him to make his defense, and avail himself of acquittal or conviction in any further prosecution for the same offense."

(R. 42.)

With respect to the sufficiency from a pleading standpoint of the allegations pertaining to consensual arrangement contained in the indictments, the court said (R. 42-43):

"The charges are much too general. They do not adequately describe the nature of the alleged unlawful conspiracy[,] agreements or arrangements which defendants are accused of having made, nor show how the defendants became parties thereto, nor how they collaborated in doing the unlawful things * * *."

It would be difficult to frame a more pointed, plain and unambiguous ruling that the indictments were insufficient as pleadings because the heart of the offense attempted to be charged therein had not been clearly and definitely stated in accordance with constitutional requirements.

In the light of the foregoing review of the court's decision on the primary point made by appellees' demurrers, it is respectfully submitted that there can be no real dispute but that the court below, in disposing of that point, clearly based its decision upon a point of criminal pleading adequate to support its judgment. And, indeed, the Government in its brief makes no real effort to meet, as we believe, the insuperable obstacle to jurisdiction presented thereby. On the contrary, the Government substantially ignores the primary basis of attack made by these appellees on the indictments below and ruled upon by the court in its opinion.

In so far as we have been able to ascertain from examination of the Government's brief, the only real attack which it attempts to make upon our contention that the court ruled that the indictments were devoid of well pleaded allegations of consensual arrangement is the veiled attack implicit in the emphasis placed (Br., p. 27) on the following statement made in the penultimate paragraph in the court's opinion (R. 42):

"Having in mind that the subject matter of the instant indictments is protected by a patent, I am of

the opinion that the defendants here have not been furnished with such definite and particular allegations of fact as will meet this test (of certainty). • • •”
(Italics added by the Government.)

By such emphasis, the Government does not dispute that the ruling of the court on the insufficiency of the allegations of agreement disposed of the indictments as a whole, but insinuates that the ruling was based upon a construction of the antitrust laws. This argument is completely refuted by the analysis of the court's opinion set forth above (pp. 26-29, *supra*), from which it appears that the court's ruling on that issue was in no way dependent upon any views which it may have entertained as to the substantive antitrust law. However, although the court's opinion does not show any such *dependency*, we do not mean to indicate that the court, in exercising its informed judgment as to the lucidity of the allegations pertaining to the nature, character and manner of formation of the consensual arrangement complained of, may not have had regard to the substantive law background which so amply discloses the necessity for frank, clear and sharp allegations in a patent antitrust case. The point is, however, that such consideration, if indulged in, was in no sense a determination of any controverted question of substantive law or in any way incident to a ruling on the sufficiency of the allegations in question to charge an offense under the Sherman Act. That is plainly determinative here, and the Government's veiled suggestion (Br., pp. 21-22) that a *nisi prius* judge, in appraising the definiteness of a pleading, must divorce himself of all knowledge of the substantive law background, or else be held to have based his decision on the substantive law, is entirely lacking in realism and merit. Indeed, the logical implication of that suggestion is that this Court must take jurisdiction of all Criminal Appeals.

B. The Court Also Determined That All Material Allegations of "Means" Contained in the Indictments Were Vague and Indefinite, and, in So Doing, Did Not Determine, or Rest His Decision Upon, Any Controverted Question of Substantive Law.

As previously noted, the appellees also urged by their demurrers a second contention (in no way dependent upon the first, just discussed), to-wit: that the indictments failed adequately to describe the "means" for effectuation of the alleged conspiracy. Having sustained the first point of the challenge for vagueness and indefiniteness, it would, of course, have been unnecessary for the Court to have dealt with the second ground at all. However, in the interest of completeness, the court likewise dealt with and sustained the challenge leveled by the second ground.

It is obvious, and is indeed suggested by the Government in its brief, that not all the "separate acts or means" alleged in the indictments are of material consequence, some dealing "with minor details" (Br., p. 11). The Government in its brief, has selected certain "means" as affording material support for its contention that violation of the Sherman Act was disclosed by the indictments (assuming adequate averment of the fact and manner of agreement). Those means may be classified as those relating to the Government's contentions that

1. "The indictment charges an unlawful conspiracy to use the Jauch patent to fix manufacturers' prices by joint action for the benefit of the patentee's former competitors" (Br., pp. 48-9);

2. "The indictment charges an unlawful conspiracy to fix resale prices" (Br., p. 50); and

3. "The indictment charges an unlawful conspiracy to pool, and suppress competition under, competing patents for the purpose of eliminating price competition" (Br., p. 46).

The same means are relied on by the Government in connection with its contention (made on the same assumption) that the indictments as a whole charged a violation of the Sherman Act (R. 38-40).

Accordingly, we consider the disposition which the trial court made of the allegations of such "means", grouped in accordance with the classification which the Government has itself made. The court squarely held, in each instance, that such means were defectively pleaded because of their vagueness and indefiniteness.

The "means" of the first class, viz.: those relating to alleged "use of the Jauch patent to fix manufacturers' prices by joint action", are the first considered by the court in its opinion (R. 37). The court disposes of such means by pointing out that

"What is meant by the phrase 'used the Jauch patent' is not quite clear. If the defendants did more than enter into ordinary patent license agreements, under the terms of which the Wayne Pump Company, as owner of the patent, licensed the others to manufacture computer pumps, and fixed the prices at which the pumps should be sold * * *, then such offense should be set out clearly in the indictments" (R. 37).

The court thus obviously held the averments insufficient solely because defectively pleaded.

The Government's contrary argument (Br., p. 32) is based on the suggestion that the court was deciding a litigated issue of substantive law in pointing out (immediately prior to the ruling above set forth) that the only pumps to which the price-fixing charge related were computer pumps—pumps the price of which Wayne had the right to fix under the Jauch patent (R. 37). But that suggestion is utterly untenable. The first portion of that statement of the court was manifestly a construction of the pleadings; the second, a parenthetical reference to an *undisputed* legal proposition made only for the purpose

of aiding the court in a *further construction* of the pleadings.

As noted in the Statement herein (p. 6, *supra*), the court construed the indictments as disclosing that the Jauch patent dominated the computer pump field. Wayne owned that patent. It thus plainly followed, under the decisions of this Court in *United States v. General Electric Co.*, 272 U. S. 476, and *Bement & Sons v. National Harrow Co.*, 186 U. S. 70, that Wayne could grant licenses to other manufacturers upon the condition that the article manufactured be not sold at a price lower than that fixed by Wayne. The court accordingly concluded that it was not the grant of such licenses (also disclosed by the pleading) of which the indictments intended to complain in referring to "use" of the Jauch patent to fix prices,—and *this was not disputed by the Government*. Of what, then, did the indictments intend to complain by such language? The court ruled that that was not clear.

We repeat;—so that there may be no possible misapprehension,—that the proposition that a patent owner is legally entitled thus to fix the prices of his licensees was in no sense a controverted issue of substantive law in the court below. There, as here, the Government took the position that

"This . . . is not a case where the patentee by independent action has fixed the selling prices of his licensees for the purpose of protecting his monopoly and the pecuniary reward therefrom" (Br., p. 49), as was true in *United States v. General Electric Co.*, *supra*,¹ but is a case in which

"The indictment charges *mutual agreement* among all the dominating manufacturers for the purpose and with the effect of fixing prices and eliminating competition . . ." (Br., p. 45).

¹ The Government has never, either here or in the court below, challenged the correctness of the *Bement* and *General Electric* cases, but, rather, is at pains to distinguish them (Br., pp. 44-45).

This latter suggestion, raising purely a pleading issue, was, however, rejected by the court, as heretofore noted at greater length (*supra*, pp. 26-27):

"How they took joint action or entered into joint agreements to use the Jauch patent to achieve the alleged illegal objectives, or how they went outside the monopoly granted to the patentee and its licensees, is nowhere set out in the indictments." (R. 38.)

With respect to the "means" of the second class, viz.: those relating to alleged fixing of resale prices, the court's ruling is equally clear. Indeed, it is not contended by the Government herein that the court, in stating abstractly the substantive law background, in any way misstated the law or passed upon a controverted question of substantive law. With obvious correctness, the court pointed out that it was unlawful to attempt to regulate future prices of a patented article after sale by the owner, citing the well-known decisions of this Court (R. 40). The court did, however, find serious fault with the manner in which the so-called resale price-fixing means were pleaded, saying (R. 40):

"However, no facts are set out to show that Wayne computer pumps were sold through jobbers, nor are the names of any specific jobbers given with whom these defendants carried on negotiations wherein the resale price of computer pumps was determined."

On this question of pleading, the court cited *United States v. Colgate & Co.*, 263 Fed. 522, affirmed 250 U. S. 300, which held that similar charges were not "stated and set forth with that degree of accuracy and certainty required in criminal pleading." The reliance by the district court on this decision is most persuasive that the questions with which the court was dealing and which it decided were purely pleading questions. This fact is further emphasized by the succeeding paragraph of the court's opinion, in which the court says:

"So in the case at bar, if these conditions exist, the

Government should have no difficulty in setting forth at least one specific instance of where defendants determined the resale price at which jobbers might resell computer pumps. If this condition does exist, surely the Government must be in possession of the facts, and *they should be set out in the indictments, so as to reasonably inform defendants of the offense with which they are charged*" (R. 41).

In the light of the foregoing, the Government is reduced to the contention (Br., pp. 34-35) that the trial court necessarily based its decision in respect of the resale price-fixing allegations of the indictment on a construction of the Sherman Act because of its "failure . . . to consider whether the Sherman Act condemns" a horizontal "agreement to fix resale prices and to boycott non-complying jobbers." This is mere grasping at straws. The court, as a matter of pleading, had already ruled that there were no sufficient allegations of *any* horizontal agreement in the indictments (*supra*, pp. 26-29).

With respect to the "means" of the third class, viz.: those relating to alleged pooling and suppression of competition under competing patents, the ruling of the court that the indictments were defective as pleadings is equally unequivocal.

Here again the trial court does not consider or discuss the substantive question of whether or not, if competing patents were involved, the indictments would charge offenses under the Sherman Act, but discusses what *facts* are disclosed by the indictments as to the asserted existence and aggregation of such patents or the suppression of competition thereunder. The court points out that although the "Government . . . insists that not one but many patents on computer pumps, computing mechanisms and improvements thereon were used to achieve the illegal purpose or conspiracy",

"again the indictments *are silent* as to the identity of the other patents aside from the Janch patent issued in November, 1932" (R. 41).

It rests its decision with respect to alleged aggregation of competing patents on the ground that

"the indictments set out no facts whereby to identify these competing patents, nor in what manner nor by whom such monopoly in them was acquired" (R. 41).

And, in respect of the Government's claim of suppression, founded on the allegations of "determination of use" by Wayne, the court adds:

"Again it is not clear what is meant by the allegation that defendants attempted to compel Neptune to submit all patents . . . to uses determined by Wayne" (R. 38).

From the foregoing resume of the court's rulings with respect to each of the three classes of "means" assigned as material by the Government itself, it conclusively appears that the court held such allegations defective solely as a matter of pleading and that its decision thereon was in no way dependent upon any controverted question of substantive law. That being so, it is likewise apparent that the court's decision on the second leg of appellees' demurrers disposed of the indictments in their entirety as defective pleadings and not for substantive insufficiency.

It is true, of course, that the court in the course of its opinion referred to various decisions applying the Sherman Act to patent anti-trust situations. For reasons stated at an earlier point, it was obviously proper for the court to have had reference to the substantive law background in construing and passing upon the vagueness and indefiniteness of the pleadings. It is to be emphasized, however, that in no sense was it determining any controverted questions of substantive law. None such was presented for decision. And, indeed, with the following exceptions, based upon a misapprehension of what the court stated, the Government does not now dispute that every abstract statement made by the court in referring to the substantive law background was correct as a matter of law.

At p. 25 of its brief, the Government states:

"Preparatory to discussing the allegations of the

indictments the court stated its view of the scope of the patent monopoly to be that a patentee has power to fix prices and grant licenses upon any terms he may choose" (R. 34-36). "

This was not what the court said. The statement made by the Government omits the significant proviso contained in the opinion:

"provided only that in so doing it did not violate any other law" (R. 34).

With the foregoing proviso the statement made by the court is obviously correct and paraphrases the very contention made by the Government in this Court.

The foregoing proviso likewise appears at the end of the quotation by the court from the opinion in the case of *Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co.*, 154 Fed. 356 (R. 34) and indicates one of the purposes of its citation of that case. That case was plainly not cited, as the Government misapprehends (Br., p. 25) "to show that whatever the patentee could do alone, he could do with others in combination," but only in support of the general proposition, containing the proviso, which we have set forth above, and of the likewise undisputed proposition that a "patentee . . . had the right to fix prices on the patented article" (R. 34, 36).

The court in its opinion made the following abstract and indisputably correct statements concerning the patent anti-trust law background (R. 37):

"While ownership of the patent gives to the patentee a complete monopoly within the field of his patent, it of course does not give him any license to violate the provisions of the Sherman Act or of any other law. Under his monopoly he may not use his patent as a pretext for fixing prices on an unpatented article of commerce; nor fix the resale price on his patented article; nor make use of tying clauses."

Counsel for the Government in their brief in this court, in commenting on this language of the district court, make the wholly unwarranted statement (Gov. Brief, p. 26) that

the court "held that *the only limitation upon the power of a patentee, acting alone or in combination with others is that 'he may not use his patent as a pretext for fixing prices on an unpatented article of commerce; nor fix the resale price on his patented article; nor make use of tying clauses.'*" The court obviously neither held nor indicated anything of the kind and had no occasion so to do. It was merely illustrating the point that the ownership of a patent gives the patentee no license to violate the Sherman Act or any other law.

The Government makes one further argument in an attempt to show that the decision of the court on this branch of appellees' demurrers was based upon a construction of the Sherman Act and constituted, in effect, a ruling that the indictments did not state offenses within the meaning thereof. It refers (Br., p. 26) to the statements made by the court towards the close of its opinion (after it had considered and found defectively pleaded every major "means" alleged in the indictments) to the effect that it did not find that, *in the means alleged*, the defendants were "charged with the doing of anything which they did not already have the right, under the patent, to do" (R. 42).

But, in the light of the court's previous painstaking review of the allegations of the major "means", in which it on at least ten separate occasions clearly pointed out that such means were defectively pleaded because vague and indefinite and lacking in identifying facts, it cannot reasonably be contended that the court at that point reversed its position and suddenly determined that all the means allegations in the indictments were defective from a substantive standpoint,—an issue not before it. On the contrary, the plain intent of the court was to convey that the defendants were not *properly* charged with doing any unlawful act.² The court had already disposed of the

² The same thought is conveyed by the last clause in the penultimate paragraph in the court's opinion (R. 43), where the sense is plainly that the indictments do not *adequately* "set out any unlawful means whereby the unlawful objectives were accomplished."

pleading insufficiency of the major "means" alleged. The Government did not then suggest, and does not now suggest that, after excision of such means from the indictments because defectively pleaded, the remaining allegations of means in and of themselves state unlawful conduct. And the language which follows the statement above quoted from the opinion of the court shows clearly that the court was referring only to the granting of price restrictive licenses by the owner of a patent to manufacturing licenses—a right of the patentee which has never been challenged by the Government in this case.

On the basis of the foregoing discussion, it is, therefore, respectfully submitted that, in sustaining the second point raised by appellees' demurrers, the court passed upon a second question of criminal pleading, fully adequate to support its judgment, and in no wise dependent upon the decision of any controverted question of substantive law.

III.

The Vagueness and Indefiniteness of the Indictments Was, At the Very Least, An Independent Ground of Decision, Fully Adequate to Support the Judgment Below, Wherefore This Court Is Without Jurisdiction.

It is our view that the district court sustained appellees' demurrers *solely* on the basis of the two points presented thereby, viz., (1) that the indictments failed adequately to plead and describe either the existence, or the nature, or the manner of formation of the consensual arrangements respectively constituting the gist of the charges made therein, and (2) that the indictments failed adequately to plead and describe the means for effectuation of such consensual arrangements. It is also our view that the court's determination of those questions,—decision of either of which was adequate to dispose of the case,—was not dependent upon a construction of the Sherman Act.

The Government does not seriously dispute, nor could it properly dispute, that the court decided that the indictments failed adequately to disclose the consensual arrangements complained of, independent of any construction of the Sherman Act.

Rather, the Government contends in effect (Br., p. 23) that, in disposing of the allegations of "means", the court below held that such means as were clearly alleged were insufficient on substantive grounds and that, to the extent that the indictments intended to charge the employment of other means, they were vague and indefinite. This is a question-begging argument, since it ignores entirely the problems of which means were material and whether the court passed on any controverted questions of substantive law. (See pp. 31, 38-39, *supra*.)

But, even if it be assumed for the sake of argument that the court below decided some controverted question of substantive law in disposing of the means allegations (which we deny), that would nevertheless fail to establish that this Court has jurisdiction over these appeals. For even on such an assumption, it remains clear that the court below, in determining that the indictments failed adequately to describe the consensual arrangements complained of, rested its decision upon an independent pleading ground, wholly adequate to dispose of the case. Under such circumstances, it is definitely established by the decisions of this Court that appeal does not lie (*supra*, p. 24).

IV.

The Burden Resting Upon the Government of Showing Affirmatively That Construction of the Sherman Act Was the Sole Ground of Decision Below Has Not Been, and Cannot Be, Sustained.

This Court has said that the right of direct appeal given to the Government by the Criminal Appeals Act is "exceptional" and to be "strictly limited to the instances

specified." It is "an innovation in criminal jurisdiction in certain classes of prosecutions" which "cannot be extended beyond its terms." (*U. S. v. Borden Co. et al.*, 308 U. S. 188, 192, *U. S. v. Keitel*, 211 U. S. 370, 399, *U. S. v. Dickinson*, 213 U. S. 92, 103.) The burden of proof is on the Government affirmatively to establish this Court's jurisdiction, and all doubts and ambiguities are to be resolved against appellate jurisdiction under the Act. (*U. S. v. Carter*, 231 U. S. 492, 493, 494, *U. S. v. Moist*, 231 U. S. 701, 703; *U. S. v. Halsey, Stuart & Co.*, 296 U. S. 451, 452.)

Applying these principles, this Court has ruled that where, as here, jurisdiction is invoked on the ground that the decision below was "based" upon a construction of the statute upon which the indictment was founded, the Government must *affirmatively* establish that proposition. (Cases cited, *supra*.) The necessary corollary of that rule is that in such cases the Government must affirmatively establish that the decision below was rested on the ground of statutory construction *and on that ground alone*.¹ And, indeed, the Government herein does not undertake any less burden.

For the reasons heretofore stated, we respectfully submit that the Government has not sustained that burden. It is submitted that, on the contrary, it affirmatively appears that the decision below was based on the sole ground raised by the demurrers, to-wit, the vagueness and indefiniteness of the indictments.

¹By the enactment of the Act of May 9, 1942 (56 Stat. 401), amending the Criminal Appeals Act as theretofore amended, the Government was granted the right to appeal to the Circuit Courts of Appeal from judgments sustaining demurrers to indictments, not directly appealable to this Court. That amendment (although it has no application to these appeals) emphasizes the lack of any occasion for this Court's departing from the principles of its prior decisions establishing the limited scope of its jurisdiction over direct appeals.

Conclusion.

It is respectfully submitted that these appeals should be dismissed.

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CHARLES ELMORE GROPLEY
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1942.

Nos. 81, 82

THE UNITED STATES OF AMERICA,
Appellant,

vs.

THE WAYNE PUMP COMPANY, ET AL.,
Appellees.

THE UNITED STATES OF AMERICA,
Appellant,

vs.

THE WAYNE PUMP COMPANY, ET AL.,
Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

**BRIEF FOR APPELLEES, GILBERT AND BARKER
MANUFACTURING COMPANY AND S. C. HOPE.**

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Company and S. C. Hope.*

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1942.

No. 81.

THE UNITED STATES OF AMERICA,
Appellant,
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ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
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**BRIEF FOR APPELLEES, GILBERT AND BARKER
MANUFACTURING COMPANY AND S. C. HOPE.**

Opinion Below.

The opinion of the District Court (R. 27-43)* is reported
in 44 F. Supp. 949.

* All record references to the opinion will be to the record in No. 81.

Jurisdiction.

The orders of the District Court sustaining demurrers to the indictments were entered on February 24, 1942 (No. 81, R. 43; No. 82, R. 45), and orders allowing appeal were entered on March 25 and 26, 1942 (No. 81, R. 45; No. 82, R. 47). The jurisdiction of this Court has been invoked by the Government by direct appeals under the Act of March 2, 1907, c. 2564, 34 Stat. 1246, as amended to March 26, 1942 (18 U. S. C. 682), known as the Criminal Appeals Act, and providing in part as follows:

"An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases, in the following instances, to-wit:

"From a decision or judgment . . . sustaining a demurrer to any indictment, or any count thereof, where such decision or judgment is based upon the . . . construction of the statute upon which the indictment is founded."

On April 10, 1942, appellees filed a statement in opposition to the statements as to jurisdiction filed by the United States. On May 25, 1942, this Court postponed further consideration of the question of its jurisdiction to the hearing of the cases on the merits (No. 81, R. 48; No. 82, R. 50).

Question Presented.

This brief is confined to the single question: Whether this Court has jurisdiction of these appeals under the Criminal Appeals Act, as it existed at the dates of appeal—March 25 and 26, 1942.

In our view this is the only question presented for the determination of this Court. Appellees did not question in the District Court, and do not question here, whether the activities generically alleged in the indictments are

lawful or unlawful under the Sherman Act. The indictments were challenged by demurrer (No. 81, R. 22-3; No. 82, R. 25-6) on the sole ground of their indefiniteness, ambiguity and uncertainty as a matter of criminal pleading. This ground of the demurrers of all the defendants is correctly stated in the District Court's summary of the demurrers, as follows (R. 33):

"The demurrers challenge the sufficiency of the indictments on the ground that *they fail to describe the alleged conspiracies and combinations* with which defendants are charged so as to inform them of the nature and cause of the accusations against them and enable them to properly prepare their defenses.

"The cases are before me now for disposition on *these demurrers.*" (Italics supplied.)

The Indictments.

The description of the indictments in the Government brief varies materially from the averments of the indictments themselves, and fails to reflect the District Court's interpretation, which is conclusive on the present appeals (*E. S. v. Borden Co.*, 308 U. S. 188, 193; *U. S. v. Hastings*, 296 U. S. 188, 192). We accordingly adopt, instead, the description of the indictments appearing in the brief for the appellees, The Wayne Pump Company and others.

Summary of Argument.

The indictments were challenged in the District Court on the sole ground of their indefiniteness, ambiguity and uncertainty as a matter of criminal pleading. No controverted question of the substantive law of the Sherman Act was involved in the determination of that issue, and no issue is taken here by these appellees on any question of that substantive law.

The opinion of the District Court, read in the light of the single challenge presented by the demurrers, fairly discloses that the insufficiency of the indictments as a matter of criminal pleading was intended by the court to be, and was, the sole ground of its decision.

The presentation in the Government's brief of what was before the District Court and what it decided is inaccurate and misleading.

ARGUMENT.

MAY IT PLEASE THE COURT:

Government counsel have painted a picture of shocking offenses with respect to the use of patents and have presented their picture to this Court just as if such offenses had been adequately charged against the defendants in these indictments, and, therefore, just as if Judge Sullivan had decided that they (the offenses in question) were not offenses.

I.

The indictments were challenged in the District Court on the sole ground of their indefiniteness, ambiguity and uncertainty as a matter of criminal pleading. No controverted question of the substantive law of the Sherman Act was involved in the determination of that issue, and no issue is taken here on any question of that substantive law.

There was not involved in the lower court, and there is not involved here, any controverted question of the substantive law of the Sherman Act. Indeed, we would cheerfully agree with Government counsel as to the unlawfulness of some of their array of offenses, considered abstractly, as did Judge Sullivan. Unquestionably an indictment for such offenses would be a good and sufficient indictment if it made a charge of them with sufficient factual matter to individuate an offense and reasonably to inform the defendants as to what they had to meet.

These indictments were challenged on the sole ground that they are so indefinite, ambiguous and uncertain that the defendants are not informed thereby as to what charge

they would have to meet. In our view, the opinion of the lower court definitely shows that Judge Sullivan adopted the challenge of the defendants, and decided on the basis of that challenge that these indictments are bad as pleadings because of their failure to meet the fundamental requirement of the Sixth Amendment that the accused shall "be informed of the nature and cause of the accusation."

We are aware that the question of the sufficiency of these indictments as a matter of pleading is one for the exclusive determination of the lower court, and that under its decisions this Court will not re-examine that question. Accordingly, we disclaim any intention to argue that question here.

But an understanding of the nature of the challenge to the indictments is essential to a correct understanding of Judge Sullivan's opinion, so we will point out with more particularity, but briefly, the one and only ground upon which these indictments were challenged.

The fundamental challenge to these indictments is that they allege nothing *factually* enough to identify a definite offense, and allege such a variety of proposed activities *generically* as to leave this defendant* guessing and speculating as to which one of half a dozen generically-stated offenses that the Grand Jury might conceivably have intended to charge, it was charging.

If this defendant were sent to trial on these indictments, it would not know what witnesses to subpoena, nor what records, papers or documents to produce. Not until the trial would this defendant know under either indictment what charge it would have to meet.

The accusatory portion of "the price fixing" indictment (Case No. 81) generically charges (Par. 26, R. 10) that Wayne, the owner of U. S. Letters Patent on the computer

* Whenever we use the term "this defendant" or "G. & B." we mean to include G. & B.'s President, the defendant S. C. Hope.

pump (and itself a manufacturer of the computer pump) together with G. & B. and Tokheim, licensees under said patent by licenses which fixed the price at which they could manufacture and sell the computer pump, together also with Veeder (a manufacturer of computing mechanisms), were engaged "in a conspiracy to fix the price" on the patented computer pump.

The accusatory portion of "the monopoly" indictment (Case No. 82) generically charges in the first count (Par. 26, R. 9) that the same defendants were engaged in a "conspiracy to monopolize the manufacture and sale of computer pumps,"—the indictment showing, as does "the price fixing" indictment, the defendant Wayne's ownership of U. S. Letters Patent on the computer pump; and generically charges in the second count (Par. 32, R. 15) that the same defendants were engaged in a "conspiracy to monopolize the manufacture and sale of computing mechanisms"—a vital part of the computer pump.

Thus far these indictments have generically accused these defendants of doing nothing more than what this Court held that the General Electric Company (patent-owner) and the Westinghouse Company (licensee, and there were thirteen other licensees) had the right to do, in *United States v. General Electric Co.*, 272 U. S. 476; and the quandary of the defendants here, as to what is their supposed offense, is no less than would have been the quandary of the General Electric Company and the Westinghouse Company, if corresponding criminal indictments for "a conspiracy" to fix prices on the patented article and "a conspiracy" to monopolize the patented article had been brought against them immediately following this Court's decision in that civil suit.

It is to be noted that these indictments have already averred (Par. 14 of the "price-fixing" indictment—No. 81, R. 8—and Par. 14 of the "monopoly" indictment—No. 82,

R. 7) that the public demand for computer pumps (the patented article) was so marked that "it has been all but impossible for any gasoline pump manufacturer to continue to engage in such business unless he manufactured computer pumps," thereby recognizing the bona fide necessity of this defendant's obtaining a license under this revolutionary patent in order to remain in business, and apparently excluding the idea that the prosecution considered that there was any "sham" or "pretense" about the transactions.

Amazing as it would be for a Grand Jury (exercising its function under the Fifth Amendment) to make a charge that such licenses are unlawful *per se*, nevertheless it is conceivable that a Grand Jury could ignore what this Court had said was the law in *United States v. General Electric Co.*, 272 U. S. 476, and other cases, and could make such a charge. And if such charge were the *only* charge in the respective indictments this defendant would at least know in each case what the charge is, and could prepare to meet it by appropriate defense. But in neither indictment is it the only charge, because each indictment *also* charges matters which would seem to negative the idea that the Grand Jury considered the licenses to be illegal *per se*, and to establish that in the mind of the Grand Jury the "conspiracy" consisted in the doing of things other than and beyond the mere taking of licenses. Those additional charges are that the defendants were going to accomplish the undisclosed "conspiracy" by "using" the Jauch patent and by a variety of other "means," some of which are apparently lawful and some not, some of which are apparently adapted to the accomplishment of the alleged objective and some are not, *but all are factually undescribed and wholly unidentified.*

Each of these indictments, therefore, confronts this defendant with a palpable ambiguity, and puts it in the

dilemma of being unable to prepare for trial against a knowable offense.

This defendant could not safely proceed on the assumption that the charge intended to be made is that the mere taking of such a license from Wayne was unlawful *per se*, because:

First, on the theory of probability as to which of at least two conceivable offenses was the one in fact intended, it is not reasonable to suppose that a Grand Jury would make such a charge in defiance of what this Court had said is the law;

Second, the Anti-Trust Division, as a matter of public record, had impliedly admitted that such licenses were lawful, because it was recommending to Congress that they be made unlawful by legislation (Preliminary Report of the Temporary National Economic Committee, 76th Congress, 1st Session, Senate Document No. 95, July 17, 1939.);

Third, if the prosecution considered that such licenses were illegal *per se*, the charge (in Case No. 81) would have been for a *contract* in restraint of trade, and not for a *combination* or *conspiracy*; and,

Fourth, the subsequent allegations of each indictment make it appear that the Grand Jury must have considered that the "conspiracy," whatever it (the Grand Jury) thought it was, consisted of doing something else.

Nor could this defendant, a mere licensee, prepare a defense on the assumption of the other hypothesis, viz., that the "conspiracy" consisted in the doing of "something else," because neither indictment anywhere factually and identifiably discloses what "the something else" was claimed to be. If the presumption of innocence is indulged, as is required by law in testing the sufficiency of an indictment, how could it be said that this defendant, a mere licensee under a patent-license not taken

until 1933, has been informed as to a definite offense by an indictment which charges only that it was "in a conspiracy," alleged to have commenced in 1932, in relation to its normal day-to-day transaction of the business of manufacturing and selling computer pumps under a patent-license from Wayne, and then alleges a variety of "means," no one of which contains any identifying matter that is calculated to bring home to this defendant a transaction or an event in which it is supposed to have been implicated. It could only be by prejudging that this defendant is guilty that one could suppose that this defendant has been informed of anything by the "means" paragraph of these indictments.

These indictments are, therefore, anomalies and, we believe, without a parallel in the reported cases of criminal proceedings in the Federal Courts. For that reason they defy logical analysis. But we confidently assert that a reflective reading of them from the viewpoint of a mere licensee, presumed by law to be innocent, would leave any court with the conviction that, *aside from any and every question of substantive law under the Sherman Act*, they are insufficient, wholly as a matter of pleading, to individuate or make known any definite offense so that this defendant could prepare for trial.

After all is said and done, G. & B. learns from these indictments no more than that "in the opinion" of the prosecution it is somehow engaged in a conspiracy alleged to be in violation of the Sherman Act. G. & B. is left in precisely the same uninformed situation as was the defendant in *People v. Green*, 368 Ill. 242, 13 N. E. (2d) 278, where the Supreme Court of Illinois sustained a demurrer on the precise ground presented by the instant demurrers, and compared the Information under the statute there involved to an indictment under the Sherman Act.

Under American principles of common justice, guar-

anted by the Sixth Amendment, a defendant can no more be put on trial on a generic charge of having been engaged over a period of nine years in an undescribed and unidentified "conspiracy" to violate the Sherman Act than could a defendant on a generic charge of having "conspired" to commit undescribed and unidentified larceny. A conspiracy is "not a pale abstraction," and it is settled that, no matter what offense is intended to be charged, the indictment must make known what the offense is, and must individuate it. *United States v. Colgate & Co.*, 253 Fed. 522, 528 (Dist. Ct. E. D. Va.) (judgment affirmed 250 U. S. 300)*; *United States v. Cruikshank*, 92 U. S. 542, 557-9; *United States v. Hess*, 124 U. S. 483, 486; *Pettibone v. United States*, 148 U. S. 197, 202; *Miller v. United States*, 133 Fed. 337, 341 (C. C. A. 8th Cir.); *Etheredge v. United States*, 186 Fed. 434, 437 (C. C. A. 5th Cir.); *Collins v. United States*, 253 Fed. 609, 610 (C. C. A. 9th Cir.); *Fontana v. United States*, 262 Fed. 283, 286 (C. C. A. 8th Cir.); *United States v. Wills*, 36 F. (2d) 855, 858 (C. C. A. 3rd Cir.).

An indictment must be sufficient not only to inform a defendant that there is a charge or claim, but so distinct and specific as clearly to advise him what he has to meet, and to give him a fair and reasonable opportunity to prepare his defense. The presumption is that a defendant is innocent, and consequently that he is ignorant of the facts on which the pleader founds his charges. It is a fundamental rule that the sufficiency of an indictment must be tested on the basis of that presumption. *Fontana v. United States*, 262 Fed. 283, 286 (C. C. A. 8th Cir.); *Miller v. United States*, 133 Fed. 337, 341 (C. C. A. 8th Cir.).

The confusion in which this defendant is left by these indictments is increased because, although they make the conclusory and noninformative charge that this defendant

* This affirmance was on the ground of the insufficiency of the indictment as a matter of substance, a ground on which the District Court also rested its judgment.

was engaged "in a conspiracy," they significantly fail to allege that this defendant, a mere licensee of the patent-owner, was in agreement with anybody other than its own licensor. *United States v. Piowaty & Sons*, 251 Fed. 375, 377; *Asgill v. United States*, 60 F. (2d) 780, 784, 785 (C. C. A. 4th Circ.).

Indeed, it would appear that the draftsman of each of these indictments was so intent on presenting a test case for obtaining a judicial determination of a selected series of questions of law *in the abstract* that he completely ignored the constitutional right of these defendants to be informed factually and identifiably of a definite offense for the alleged commission of which they were to be placed on trial.

And so the challenge to these indictments being on the constitutional ground of their failure to make known what offense was intended to be charged, this defendant is able to say now, as in the District Court, there is not now, and has not been, any occasion to construe the Sherman Act. There being no controverted question of substantive law involved, it would make no difference in reaching the conclusion that these indictments are bad as a matter of criminal pleading whether any given abstract question of the substantive right of a patent-owner under the Sherman Act "is voted up or voted down,"—either way the indictments still fail to inform this defendant as to what factually recognizable offense was intended to be charged.

In the nature of things, if this defendant was left in doubt and uncertainty in January, 1941, when these indictments were returned, as to what offenses the Grand Jury intended to charge, that doubt and uncertainty—occasioned; as we contend Judge Sullivan has held, wholly by *defective pleading* and failure of the indictments to identify any definite offense which that Grand Jury intended to charge—would not be removed by any subsequent decision of this Court as to substantive but *abstract* law of the

Sherman Act, not even if this Court should now completely overrule *United States v. General Electric Company*. Such an overruling of the *General Electric* case, or a modification of its doctrine, would not tend to throw any light on the question here left unanswered: viz., what offense did the Grand Jury which returned these indictments in January, 1941, intend to charge? Elaboration is unnecessary to show that this question is wholly different from the *ex post facto* question that would be involved if this Court should now overrule the *General Electric* case and a Grand Jury should then return an indictment, predicated on that decision, which adequately revealed what the claimed offense was, even though it was for transactions that occurred while the doctrine of the *General Electric* case was still in force.

II.

The opinion of the District Court, read in the light of the challenge of the demurrers, fairly discloses that the insufficiency of the indictments as a matter of criminal pleading was intended by the court to be, and was, the sole ground of decision.

It appears reasonably certain that the District Court adopted the exact challenge of the demurrers, and that the one and only ground upon which the District Court held these indictments bad was their insufficiency as a matter of criminal pleading, from the following:

FIRST: The District Court prefaced its opinion with the statement (R. 33):

"The demurrers challenge the sufficiency of the indictments on the ground that *they fail to describe the alleged conspiracies and combinations* with which defendants are charged so as to inform them of the nature and cause of the accusations against them and enable them to properly prepare their defenses.

"The cases are before me now for disposition on *these demurrers.*" (Italics supplied.)

From this precise statement by the Court of the issue before it, the inference is strong that the intention of the Court was to decide the cases on the basis of that issue alone.

SECOND: At the threshold of its consideration of the issue, the District Court rejected the possibility that the indictments might be interpreted as intending to charge that licenses under the Jauch patent, which fixed the licensees' selling price of the patented computer pump, were unlawful *per se*, in view of the settled law to the contrary as declared in the decisions reviewed in the opinion, and conducted its study of the indictments on the theory that the offenses intended to be charged must be taken to have consisted in the doing of something else.

THIRD: In its search for definite and particular allegations of fact which would serve "to inform the defendants of the nature and cause of the accusations against them," the District Court examines the allegations seriatim, and, regardless of whether the Court makes the observation that any given, generically alleged, activity is lawful or unlawful, it takes occasion at least ten separate times to point out that the difficulty with the indictments is their failure to set out "identifying facts." For example, in disposing of the Government's contentions (a) that "competing patents" are involved, and (b) that "not one but many patents," were used, etc., the opinion states (R. 41):

"The Government in its argument insists that competing patents are here involved, and that a monopoly of competing patents was acquired by some of the defendants in furtherance of the plan to carry out the conspiracy, but the indictments *set out no facts* whereby to *identify* these competing patents, *nor in what manner nor by whom* such monopoly in them was acquired. The Government also insists that not one but many patents on computer pumps, computing mecha-

nisms and improvements thereon were used to achieve the illegal purpose or conspiracy, but again the indictments *are silent* as to the *identity* of the other patents aside from the Jauch patent issued in November, 1932." (Italics supplied.)

The remaining instances in which the District Judge observes a similar lack of identifying matter are summarized below:

(1) With respect to the first clause set forth in paragraph 27, he says (R. 37), "What is meant by the phrase 'used the Jauch patent' is not quite clear."

(2) He then says (R. 37) that if the defendants "did more than enter into ordinary patent license agreements," etc.; or "if the Government claims" that what the defendants did was something more than the exercise of a patent monopoly, "then such offense should be set out clearly in the indictments."

(3) In contrasting the lack of averment of these indictments with the facts established in *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20—the *Bath Tub* case—the Court says (R. 37): "In fact there is no allegation that there was any understanding or agreement among the defendants at all; aside from the allegation that they 'knowingly have entered into and engaged in a combination and conspiracy to fix and maintain noncompetitive prices and to monopolize the manufacture and sale of computer pumps and computing mechanisms, by the doing of the things set out.'" (4) Then, in considering the Government's argument regarding the similarity of the *Bath Tub* case, he says (R. 38): "The difficulty is that the Government fails to set out any identifying facts," etc.

(5) He then says (R. 38) that "it is not clear what is meant by the allegation that defendants attempted to compel Neptune to submit all patents owned or controlled by it on computer pumps and computing mechanisms 'to uses determined by Wayne.'" (6)

Then, in discussing the vague charge that the defendant Wayne, "with the consent of G. & B. and

Tokheim," was attempting to induce gasoline pump manufacturers to accept licenses under the Jauch patent, the Court says (R. 39) that if the defendants made use of "unlawful means, then those facts should be set out in the indictments." (7) Then, in discussing the vague allegation regarding the licensees' acknowledging the validity of the Jauch patent, the Court says (R. 40): "If any unlawful means were used in securing this acknowledgment, then the indictments should set them out clearly enough for defendants to meet these charges." (8) In discussing the generic charge that the defendants were going to determine the resale prices of jobbers, he clearly recognizes that the fixing of resale prices on any article is unlawful, and then says (R. 40): "However, *no facts are set out* to show that the Wayne computer pumps were sold through jobbers, nor are the names of any specific jobbers given with whom these defendants carried on negotiations wherein the resale price of computer pumps was determined." Continuing the discussion of this abstract question of fixing resale prices, he again says (R. 41): "If this condition does exist, surely the Government must be in possession of the facts, and they should be set out in the indictments, so as to reasonably inform defendants of the offense with which they are charged." (9) Again, after observing that "tying clauses" are prohibited, he repeats the theme (R. 41) "but no facts are set out in the present indictments which charge defendants with the creation of a monopoly by means of 'tying clauses.'" (10) Again, in considering the possibility that the claimed offense consisted in going outside the domain of the Jauch patent, the Court says (R. 42): "no factual allegations are set out in the indictments to show that they did this." (Italics supplied.)

FOURTH: And finally the District Court shows conclusively that, aside from all questions of substantive law, it is condemning each of these indictments *as a whole* on the ground of its insufficiency as a matter of criminal

pleading under the requirements of the Sixth Amendment, by concluding its opinion as follows (R. 42):

"It is fundamental that in every indictment the defendant is entitled to be informed with such definiteness and certainty of the accusations against him as will enable him to make his defense, and avail himself of acquittal or conviction in any further prosecution for the same offense. Having in mind that the subject matter of the instant indictments is protected by a patent, *I am of the opinion that the defendants here have not been furnished with such definite and particular allegations of fact as will meet this test. The charges are much too general.* They do not adequately describe the nature of the alleged unlawful conspiracy agreements or arrangements which defendants are accused of having made, nor show *how* the defendants became parties thereto, nor *how* they collaborated in doing the unlawful things; nor set out any unlawful means whereby the unlawful objectives were accomplished.

"Believing as I do, for the reasons heretofore stated, that the indictments are insufficient, the demurrers thereto will be sustained." (Italics supplied.)

A fair reading of the last clause of the above-quoted sentence commencing "They do not adequately describe," etc., obviously requires that the meaning conveyed by the word "adequately" in the first clause of the sentence is to be carried forward to the last clause. That is so because, it will be observed, the one theme which the opinion has been following has been the failure "adequately" to charge or set forth an offense. The District Court could not have meant that the indictments fail to set out any unlawful means, generically alleged, because in the opinion the District Court has previously observed that at least three of the "means," generically alleged and considered as abstract propositions, are unlawful.

A fair reading of the opinion requires, for the same rea-

son, that whenever Judge Sullivan uses the expression "charge" or "set out," he means "adequately" charge or set out, so as to comply with the requirements of the Sixth Amendment.

The following additional considerations confirm our interpretation of the District Court's opinion:

The District Court's opinion expressly recognizes that Wayne's Jauch patent did not clothe it with any franchise to violate the Sherman Act, and that Wayne and its licensees *could* have been charged with having been engaged in the unlawful conspiracies and activities generically charged and alleged, as evidenced by the following:

"As owner of the patent the Wayne Company had the right to grant these licenses on its own terms and conditions, * * * *provided only that in so doing it did not violate any other law.*" (R. 34)

"While ownership of the patent gives to the patentee a complete monopoly within the field of his patent, *it of course does not give him any license to violate the provisions of the Sherman Act or of any other law.* Under his monopoly he may not use his patent as a pretext for fixing prices on an unpatented article of commerce; nor fix the resale price on his patented article; nor make use of 'tying clauses.'" (R. 37)

"If the defendants did more than enter into ordinary patent license agreements, under the terms of which the Wayne Pump Company, as owner of the patent, licensed the others to manufacture computer pumps, and fixed the prices at which the pumps should be sold; *or if the Government claims that these defendants were involved in some offense under the Sherman Act other than the exercise of a patent monopoly,* then such offense should be set out clearly in the indictments." (R. 37) (Italics in foregoing quotations supplied.)

Although the Court enumerated three specific possible activities as being unlawful, it is evident that he did not

intend these to be exclusive, and that he recognized as being unlawful anything not falling within the accepted rights and incidents of the patent grant, as affirmatively declared in the decisions of this Court cited and quoted from in his opinion.

It must be kept in mind that the indictments which the District Court is dealing with in its opinion are not to be treated as if each contained one and only one *conceivable* charge, as, for example, that the granting and taking of a license fixing the prices of the licensee is unlawful *per se*. It is to be remembered as to each of these indictments that the District Court is engaged in trying to determine what definite offense, out of various conceivable offenses which the Grand Jury might have intended to charge, it was charging.

In its inquiry resulting in the conclusion that no offense is definitely and identifiably charged, it is apparent from the opinion that the Court is not holding that any particular charge, if made, would not constitute an offense under the Sherman Act, but is only holding that the Court is unable to determine from either indictment what charge under the Sherman Act was intended to be made. In quoting from this Court's opinions in the *General Electric* case, and other cases, the District Court is doing so only for the purpose of showing the reason for the Court's final conclusion that the indictment is "much too general" and that it does not "adequately describe the nature of the alleged unlawful conspiracy agreements or arrangements which defendants are accused of having made," etc. (R. 42).

Whenever persons are indicted in respect to the doing of something as to which they have a franchise, a license or a right to do *at least something*, and the indictment itself, as here, reveals the existence of such franchise, etc., they will necessarily be left in doubt as to what is their supposed offense, *if the indictment charges just as if there were no franchise, license or right whatsoever.*

The inherent idea will be clearly seen if we suppose an indictment for "a conspiracy," brought against Dr. William Smith (shown by the indictment to be a licensed surgeon) and certain named internes and registered nurses of a hospital; as "co-conspirators,"—the supposed "conspiracy" being for the doing of something (anything) which, as here, obviously relates to the conduct of the defendants' profession or business under such special right or franchise. The indictment then proceeds to say that it was a part of said "conspiracy" that the conspirators were going to "use" a sharp knife and were going to do other things, all of which are left undescribed and unidentified. The indictment does not even allege that they were going to "misuse" the knife, and obviously there is no revealing or identifying information residing in the conclusory charge that the defendants were engaged in "a conspiracy."*

Such an indictment would necessarily leave the defendants in doubt as to *what* offense they were charged with. The prosecuting officer might well be a reformer and have the idea that all cutting of a human being, even by a licensed surgeon, is unlawful. Under such an indictment the claimed offense might well be, and for aught that the indictment discloses, nothing more than an ordinary surgical operation in a hospital. And if a judge, in sustaining a demurrer to that indictment on the ground of uncertainty, had first taken notice of the recognized functions of a licensed surgeon and then said "having in mind that the principal alleged conspirator is a licensed surgeon, this indictment is much too general," he would no more be deciding the boundary line, dividing what is lawful or what is

* In this hypothetical indictment against a licensed surgeon and his assistants we have made no attempt to work out the details of the charge. Our purpose is only to illustrate the one idea how the defendants would, as a practical matter, be left in uncertainty as to what offense was intended to be charged against them if the indictment on its face disclosed the existence of a special right or franchise which, under existing law, would render the transaction lawful, and yet the indictment charges precisely as if there were no right or franchise whatsoever, and therefore fails to disclose what the claimed offense is.

unlawful for a surgeon to do, than has Judge Sullivan decided the lawful boundary line of patents under the Sherman Act when, in finally concluding that the instant indictments are insufficient, he said (R. 42):

"Having in mind that the subject matter of the instant indictments is protected by a patent, I am of the opinion that the defendants here have not been furnished with such definite and particular allegations of fact as will meet this test."

In neither the hypothetical accusation against the licensed surgeon, nor in the instant case, has the presiding judge made any decision as to the extent or scope of the right; he has only recognized the existence of a right of some kind, and "having *that* in mind" has decided that the indictment is insufficient because it is so general and indefinite that it fails to make known how it is claimed that the right (whatever its scope) has been exceeded, so as thereby to disclose a definite and identifiable offense.

III.

The presentation in the Government's brief of what was before the District Court and what it decided is inaccurate and misleading.

The brief for the Government not only discusses the question of "offenses" of a patent-owner under the Sherman Act *as if* such offenses had been adequately alleged so that this defendant could know what offenses it had been charged with, but actually as if it had been proven that this defendant was implicated in such offenses. Throughout their brief (*e. g.*, pp. 7, 9, 10, 16, 17, 24, 28, 32-33, 34, 40, 42, 45, 49 and 51) Government counsel represent the matter as if the indictments had alleged that the defendants had "agreed *among themselves*" or had entered into "mutual agreements" to do sundry things, all

of which are undescribed and factually unidentified, and all calculated to prejudice the defendants and to produce the impression that the defendants would therefore know what they had "agreed" to do; whereas the fact is that the indictments nowhere allege that the defendants "agreed" to do any of the supposed things,—much less do they give any particulars whatsoever, such as time, place or circumstances, which if given would at least serve to give the theory of the prosecution. In this regard, the draftsman of the indictments contented himself with the generic and wholly uninforming charge that the defendants "were engaged in a conspiracy," just as if he (the draftsman) had never heard of the requirements for a criminal indictment under the Sixth Amendment.

In order to bolster up their factually insufficient charges of conspiracy against *this* defendant Government counsel resort (pp. 24 and 47) to an alleged "overt" act of another defendant, in disregard of settled law that "overt acts" are no part of the conspiracy, and cannot be resorted to in order to identify or complete the conspiracy charge. In their attempt to have it appear here that these cases are not to be distinguished from *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20 (*Bath Tub* case), except as these cases are "more extreme," they make incomplete and therefore misleading statements (pp. 26 and 41) as to the reasons given by Judge Sullivan for his conclusion that the *Bath Tub* case had not been *pleaded* here. There is not only an absence of averments in the indictments that would suggest that another *Bath Tub* case was intended to be pleaded, but affirmative averments are in these indictments that would seem to indicate the intention of the pleader to make out a case involving a different question.

Contrary to Judge Sullivan's interpretation of the charge in "the price fixing" indictment as to who it was that was going to fix the prices of the licensees, and in disregard of this Court's decisions that the lower court's interpretation

is conclusive of what an indictment charges, Government counsel contend here (p. 49) that the indictment charges that prices were going to be fixed by "joint action" of some of the defendants. The allegation in the indictment is by no means clear, but Judge Sullivan's interpretation of it is that Wayne (the patent-owner and itself a manufacturer of computer pumps) was to fix the prices of the licensees (R. 37).

Government counsel do not hesitate to go outside the record (pp. 25 and 31), but, nevertheless, they present an erroneous impression as to what arguments were before Judge Sullivan and therefore as to what his decision on those arguments was. In their STATEMENT AS TO JURISDICTION, and in support of their contention that his decision was based on a construction of the Sherman Act, they say: "This interpretation of the opinion is supported by the fact that *all* of the decisions relied upon by the Court to reach its conclusion relate to the scope of the Sherman Act and the patent law." That statement is palpably incorrect because Judge Sullivan cited and quoted at length (R. 40) from *United States v. Colgate & Co.*, 253 Fed. 522 in support of his conclusion (R. 41): "If this condition does exist, surely the Government must be in possession of the facts, and they should be set out in the indictments, so as to reasonably inform defendants of the offense with which they are charged." Furthermore, candor would have precluded any Government counsel, who attended the two-day argument before Judge Sullivan and knew the vast array of pleading cases cited in the Briefs and at the oral argument, from attempting to produce the impression here that no "pleading" cases were before Judge Sullivan. There was such an array of cases as to the requirements of a criminal indictment that it would have been altogether inordinate for him to cite them, or do more than cover that question by saying (R. 42):

"It is fundamental that in every indictment the de-

fendant is entitled to be informed with such definiteness and certainty of the accusations against him as will enable him to make his defense, and avail himself of acquittal or conviction in any further prosecution for the same offense."

Conclusion.

Every indictment brought by the Federal Government is necessarily brought under a Federal statute. If such an indictment is challenged by a demurrer on the ground that although the charge is recognizable, it does not constitute an offense, then of course a decision sustaining such a demurrer would be based on a construction of the statute, and an appeal would obviously lie to this Court.

But if a Federal indictment is challenged on the ground, as here, that the allegations are so general and uncertain that the defendants are not able to tell *what* offense was intended to be charged, then we respectfully submit that if the lower court adopts such challenge and sustains the demurrer and, in conducting its inquiry as to what offense, if any, can be recognized, takes notice of the doctrines theretofore pronounced by this Court for the purpose of laying aside or rejecting one of the conceivable offenses, as not being the one intended to be charged, its decision is not based on a construction of the statute, and no appeal lies to this Court. As hereinabove stated, a court can presume that a Grand Jury would not intentionally bring a charge in defiance of what this Court has said is the law, and in acting on such presumption for the purpose of rejecting such charge, when the charge intended by the Grand Jury might well be something else, a court is not making any construction of the statute under which the indictment is brought.

Again, we respectfully suggest that the question as to whether or not an indictment is sufficient reasonably to inform a defendant as to what he is charged with is

a practical one. A court should properly view the indictment through the eyes, and from the standpoint of, the accused. In so viewing the indictment, the court will realize that the accused in attempting, through his counsel, to determine what offense he has to meet, must necessarily give some consideration to what this Court has said is lawful for the accused to do. If then the court can see that the accused is necessarily left in honest doubt, because (a) upon one conjecture as to the charge of the indictment, it is a charge that recognizes no right whatsoever and seems to be charging nothing more than what this Court had held to be lawful, and (b) upon the other conjecture as to the charge of the indictment, the court can find no factual matter to identify an offense, and if for such reasons the court finds the indictment bad as a whole, its decision is not based on a construction of the statute. If that be not so, it is difficult to imagine how a demurrer could ever be sustained to a Federal indictment merely as a matter of pleading and without a construction of the statute under which the indictment was brought. An appeal would lie to this Court whenever a demurrer is sustained to a Federal indictment, which of course would be contrary to the spirit and intent of the Criminal Appeals Act, as construed by this Court.

For the reasons stated hereinabove and in the statement of appellees in opposition to jurisdiction, we submit that these appeals should be dismissed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

Nos. 81 and 82. — OCTOBER TERM, 1942.

The United States of America,
Appellant,
81 vs.
The Wayne Pump Company, Gilbert and Barker Manufacturing Company, Tokheim Oil Tank and Pump Company, et al.

On Appeal from the District Court of the United States for the Northern District of Illinois.

The United States of America,
Appellant,
82 vs.
The Wayne Pump Company, Gilbert and Barker Manufacturing Company, Tokheim Oil Tank and Pump Company, et al.

On Appeal from the District Court of the United States for the Northern District of Illinois.

[December 7, 1942.]

Mr. Justice REED delivered the opinion of the Court.

These are companion appeals from orders sustaining demurrers to indictments for violations of the Sherman Act. The indictment in No. 81 charges the defendants, manufacturers of gasoline pumps, a manufacturer of gasoline computing mechanisms and a gasoline pump manufacturing association, and certain of their officers, with conspiracy extending from 1932 to the date of the indictment, January 31, 1941, to fix the prices of computer pumps in interstate trade and commerce, in violation of Section 1 of the Sherman Act. Computer pumps are gasoline pumps embodying a mechanism which calculates, measures, displays and records the quantities and prices of gasoline passing through the pumps to the purchasers. In No. 82 the defendants are the same except that the association and its officer are omitted. This latter indictment varies from the former in that in two counts it charges a conspiracy to monopolize the manufacture and sale of computer pumps and computing mechanisms in violation of Section 2 of the Sherman Act.¹

¹ Section 1: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or

The facts alleged to support the charge in the count for price fixing and those to support the count for monopolizing are substantially the same. The counts vary only as to the purposes alleged. The same means allegedly are employed to carry out each conspiracy. As similar legal issues arise in each case and as our conclusions upon each count are based upon the same reasoning, it is not necessary to make further differentiations between the counts. One opinion was handed down by the district court. It sets out the indictments quite fully. *United States v. Wayne Pump Company*, 44 F. Supp. 949.

As our decision does not and cannot in our view consider the correctness of a trial court's judgment that an indictment failed properly to allege the facts establishing a crime (*United States v. Sanges*, 144 U. S. 310; *United States v. Burroughs*, 289 U. S. 159) we do not set out the allegations of these counts in extenso. This has been done in *United States v. Wayne Pump Company*, *supra*. We shall state here for convenience in getting a focus on the problem only that the counts of the indictments charged conspiracies among the defendants to fix prices on and monopolize the interstate trade in computer pumps and computing mechanisms by a scheme for using patent rights and licenses to manufacture under them.

The defendants demurred to the indictments as insufficient in law to state an offense. It was said in the demurrers that the indictments failed to describe or particularize the offense attempted to be charged with sufficient definiteness, certainty or specificity to inform the defendants of the nature and causes of the accusations or to enable them to plead an acquittal or conviction thereunder in bar of other proceedings.

The trial court sustained the demurrers to each count from which ruling appeals to this Court were prayed under the Criminal Appeals Act, 34 Stat. 1246. That statute authorizes an appeal to

conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor; and, on conviction thereof, shall be punished by fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." 50 Stat. 693, 15 U. S. C. § 1.

Section 2: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." 26 Stat. 209, 15 U. S. C. § 2.

this Court "from a decision or judgment quashing, setting aside, or sustaining a demurrer to any indictment, or any count thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded."² We have no jurisdiction if the judgment below is not so based. *United States v. Hastings*, 296 U. S. 188; *United States v. Halsey, Stuart & Co.*, 296 U. S. 451; *United States v. Borden Co.*, 308 U. S. 188.

In their statement opposing jurisdiction appellees contended that the demurrers were sustained because of the insufficiency of the indictments as pleadings, as distinguished from a construction of the statute upon which the indictments were based and therefore questioned our jurisdiction under the Act. We postponed decision of this question to the argument on the merits and we now come to its decision.

There is disagreement between the parties as to whether the district court sustained the demurrers on the ground of the deficiency of the pleadings as well as upon a construction of the statute. The language of the opinion makes it apparent to us that the district court's conclusion was at least in part bottomed upon the indefiniteness, uncertainty and lack of specificity of the indictments. In the opinion it is said, 44 F. Supp. 949, 956:

"There is no charge that defendants fixed the prices of gasoline pumps generally, or restricted their manufacture and sale. They are charged only with fixing the prices of computer pumps, a right which the Wayne Pump Company already had under the statutory monopoly granted by the Government when its patent was issued. What is meant by the phrase 'used the Jauch patent' is not quite clear. If the defendants did more than enter into ordinary patent license agreements, under the terms of which the Wayne Pump Company, as owner of the patent, licensed the others to manufacture computer pumps, and fixed the prices at which the pumps should be sold; or if the Government claims that these defendants were involved in some offense under the Sherman Act other than the exercise of a patent monopoly, then such offense should be set out clearly in the indictments."

² As amended on May 9, 1942, the Act further provides: "An appeal may be taken by and on behalf of the United States from the district courts to a circuit court of appeals or the United States Court of Appeals for the District of Columbia, as the case may be, in all criminal cases, in the following instances, to wit: From a decision or judgment quashing, setting aside, or sustaining a demurrer or plea in abatement to any indictment or information; or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this Act." 56 Stat. 271, 18 U. S. C. § 682.

The court further said, *Id.*, 956:

"How they took joint action or entered into joint agreements to use the Jauch patent to achieve the alleged illegal objectives, or how they went outside the monopoly granted to the patentee and its licensees, is nowhere set out in the indictments."

The lower court in *United States v. Colgate & Co.* 253 F. 522, affirmed 250 U. S. 300, had criticized an indictment because of failure to set out facts against any set of wholesalers or retailers alleged to have acted in combination with the defendant. In this case, commenting upon what is said to be a similar situation, the district court said, *Id.*, 958:

"So in the case at bar, if these conditions exist, the Government should have no difficulty in setting forth at least one specific instance of where defendants determined the resale price at which jobbers might resell computer pumps. If this condition does exist, surely the Government must be in possession of the facts, and they should be set out in the indictments, so as to reasonably inform defendants of the offense with which they are charged." The opinion added, *Id.*, 958:

"The Government in its argument insists that competing patents are here involved, and that a monopoly of competing patents was acquired by some of the defendants in furtherance of the plan to carry out the conspiracy, but the indictments set out no facts whereby to identify these competing patents, nor in what manner nor by whom such monopoly in them was acquired."

Finally the trial court concluded, *Id.*, 959:

"It is fundamental that in every indictment the defendant is entitled to be informed with such definiteness and certainty of the accusations against him as will enable him to make his defense, and avail himself of acquittal or conviction in any further prosecution for the same offense. Having in mind that the subject matter of the instant indictments is protected by a patent, I am of the opinion that the defendants here have not been furnished with such definite and particular allegations of fact as will meet this test. The charges are much too general. They do not adequately describe the nature of the alleged unlawful conspiracy agreements or arrangements which defendants are accused of having made, nor show how the defendants became parties thereto, nor how they collaborated in doing the unlawful things; nor set out any unlawful means whereby the unlawful objectives were accomplished."

Further, the district court, in our opinion, made it altogether clear that it was not determining solely the limits of a patent

monopoly. It pointed out that a patentee might license (*Id.*, 954) as it chose, provided only that in so doing it did not violate any other law. The Sherman Act was in mind. The court said, *Id.*, 956:

“While ownership of the patent gives to the patentee a complete monopoly within the field of his patent, it of course does not give him any license to violate the provisions of the Sherman Act or of any other law. Under his monopoly he may not use his patent as a pretext for fixing prices on an unpatented article of commerce; nor fix the resale price on his patented article; nor make use of ‘tying clauses.’”

The government of course recognizes that the opinion manifests the district court’s view that the indictment failed to allege violations of the Sherman Act with sufficient definiteness and particularity. But the government urges that such a ruling arose from the district court’s error in holding on the merits that the facts set out in the indictment do not charge, as a matter of substance, crimes within the meaning of the Sherman Act. It is the government’s contention that after making this fundamental ruling, the district court “then simply went on to say that the indictments are defective as pleadings if they are intended to charge crimes within the Sherman Act as that Act is construed by the court below.”

We do not read the district court’s opinion in that way. Where a court interprets a criminal statute so as to exclude certain acts and transactions from its reach, it would of necessity also hold expressly or impliedly, as the government suggests, that the indictment considered merely as a pleading was defective. Yet, the essence of the ruling would be based upon a construction of the statute. We accept as correct, for the purposes of this discussion only, the government’s understanding of the opinion as holding that the allegations of the indictment, considered in substance and apart from required specificity, did not allege violations of the Sherman Act. It was a statutory construction such as that just stated which led this Court to accept jurisdiction under the Criminal Appeals Act in *United States v. Hastings*, 296 U. S. 188, 195.

In the light of the opinion, however, we conclude that the judgment upholding the demurrer was based also on grounds independent of the construction of the statute involved. The demurrers upon which the ruling below was based show on their face, as

appears from the typical example below, that they were aimed not at the coverage of the Sherman Act but at the form of the indictments.³ This was the objection determined by the court. The excerpts from the opinion quoted above are conclusive, we think, that the District Court rested its ruling on the insufficiency of the pleading as an independent ground.

Since the judgment below was not placed solely upon the invalidity or construction of the statute but had an additional and independent ground, ~~as here~~ the Criminal Appeals Act does not authorize review. *United States v. Hastings*, 296 U. S. 188, 193; *United States v. Halsey, Stuart & Co.*, 296 U. S. 451; *United States v. Borden Co.*, 308 U. S. 188, 193.⁴ Any contrary holding would be to assume a power of review not bestowed by Congress.⁵ Furthermore, at the time of the entry of the District Court judg-

³The formal parts are omitted:

"1. Said indictment and each count thereof, in violation of the rights guaranteed to said defendants by the Fifth and Sixth Amendments to the Constitution of the United States, fails to describe and particularize the offenses attempted to be charged therein with sufficient definiteness, certainty and specificity to inform them of the nature and cause of the accusation, to enable them to prepare and make their defense thereto, and to enable them to plead an acquittal or a conviction thereunder in bar of any other proceedings against them based on the matters or things, or any of them, on which said indictment is based.

2. The averments of said indictment, and each count thereof, purporting to charge a combination and conspiracy to monopolize the manufacture and sale of computer pumps and a combination and conspiracy to monopolize the manufacture and sale of computing mechanisms are mere conclusions.

3. Said indictment fails to make averments sufficient to identify and describe the supposed combination and conspiracy in each count of said indictment alleged, in that it does not allege with particularity any of the following:

(a) The factual basis upon which the United States relies for its charge that said combinations and conspiracies exist or have existed;

(b) The manner of formation of the supposed combinations and conspiracies;

(c) The terms of the supposed combinations and conspiracies; or

(d) The manner in and by which it is claimed that said defendants became parties to the supposed combinations or conspiracies.

4. The averments in said indictment and each count thereof with respect to the supposed combinations and conspiracies to monopolize, and the intended means for the accomplishment thereof, are so vague, indefinite, uncertain, and conclusory in character as to fail to apprise said defendants of the manner in which the prosecution claims that they have violated the law pertaining to combination or conspiracy to monopolize the manufacture and sale of computer pumps or the manufacture and sale of computing mechanisms."

⁴At one time, this Court permitted review under the Criminal Appeals Act of questions of statutory construction even where such questions were not the sole basis of the judgment. *United States v. Stevenson*, 215 U. S. 190, 195. This practice was disapproved. See *United States v. Hastings*, 296 U. S. 188, 194.

⁵*United States v. Hastings*, 296 U. S. 188, 192, n. 2.

ment, there was no provision for review of orders sustaining demurrers upon grounds other than those involving the construction of the basic statute.

The Criminal Appeals Act,⁶ under which the government brought these cases here, now contains a provision for a remand to the circuit court of appeals if review by this Court on direct appeal is found to be unauthorized. The government does not differ with appellees' specific statement that the new provision is inapplicable to this appeal. We do not think that it is applicable. Six weeks after time to appeal had expired⁷ the act was amended.⁸ The amendment for the first time permits appeals to the circuit courts of appeals from orders sustaining a demurrer to an indictment in cases not directly appealable to this Court. The time to appeal to all courts remains unchanged. The amendment provides that "if an appeal shall be taken pursuant to this Act to the Supreme Court of the United States which, in the opinion of that Court, should have been taken to a circuit court of appeals . . . the Supreme Court of the United States shall remand the cause to the circuit court of appeals . . . which shall then have jurisdiction to hear and determine the same as if the appeal had been taken to that court in the first instance; . . ." This language directs the remand of a case in which the appeal, at the time it was taken, should have been taken to the circuit court of appeals but was instead erroneously taken to this Court. It is intended to save to the government the right of appeal which might otherwise be lost by its erroneous view as to the proper appellate tribunal.⁹ At the time the instant appeals were taken there was no statutory authority for an appeal to the circuit court of appeals and therefore no room for an erroneous choice between appellate courts. Consequently, the proviso has no application. To hold otherwise would be to give a right of appeal where none

⁶ Act of March 2, 1907, 34 Stat. 1246, 18 U. S. C. § 682.

⁷ The orders appealed from are dated February 24, 1942. The act provides that appeals be taken within thirty days after the judgment is rendered. Petitions for appeal were allowed March 26, 1942, within the thirty day period.

⁸ Act of May 9, 1942, 56 Stat. 271.

⁹ In describing the effect of the bill it was said by the House Conference Managers that the act "permits appeals to the circuit courts of appeals of the United States where appeals have improperly been taken directly to the Supreme Court. . . . In other words, it permits of a correction of the appeal in cases where appeal has been taken to the wrong court." H. Rep. No. 2052, 77th Cong., 2d Sess., p. 2; see also H. Rep. No. 45, 77th Cong., 1st Sess., p. 2.

existed at the time the appeal was taken. While this might be permissible if there were such a legislative intention, the amendment is not retrospective in terms. *Stephens v. Cherokee Nation*, 174 U. S. 445, 478; *Freeborn v. Smith*, 2 Wall. 160. Nor does it appear that Congress had the instant case in mind in enacting the amendment. *H. Rouw Co. v. Crivella*, 310 U. S. 612. We therefore view the right to appeal and the court to which an appeal lies as they existed at the time the appeal was taken. *Gwin v. United States*, 184 U. S. 669, 674.

Dismissed.

Mr. Justice JACKSON took no part in the consideration of these appeals.

Mr. Justice DOUGLAS, dissenting.

Mr. Justice BLACK, Mr. Justice MURPHY and I are of the view that the judgments should be reversed. In our opinion the District Court's rulings that the indictments were defective resulted from interpretations of the Sherman Act and the patent law which are erroneous in light of *United States v. Masonite Corporation*, 316 U. S. 265, and related cases.

A true copy.

Test:

Clerk, Supreme Court, U. S.

